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No. 85-507

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

COUNTY SANITATION DISTRICT NO. 2
OF LOS ANGELES COUNTY
a public agency,
Petitioner,
VS.
LOS ANGELES COUNTY EMPLOYEES
ASSOCIATION, LOCAL 660,
SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL-CIO, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner, County Sanitation District No. 2 of Los Angeles County, failed to raise the federal question before the California Supreme Court in a timely manner;

2. Whether the decision of the California Supreme Court in the instant matter rests upon adequate and independent state grounds;

Whether the California Supreme Court's decision in *County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees Association, Local 660,* granting sanitation district workers the right to strike, is repugnant and in conflict with the Federal Water Pollution Control Act and the Federal Resource Conservation and Recovery Act of 1976.

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Respondents, Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO, Victor N. Hochee, Harry Gluck and Jack Roberts, oppose the Petition for Writ of Certiorari. Petitioner's request for this Court's review is not justified in that Petitioner failed to preserve the federal question below. Further, this Court should not grant review in that the decision of the California Supreme Court in this

matter rests on substantial and independent state grounds.

OPINION AND JUDGMENT BELOW

The decision of the California Supreme Court is reported as *County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees' Association, Local 660* (1985), 38 Cal.3d 564, 214 Cal.Rptr. 424, 699 P.2d 835, and is reprinted in Petitioner's Brief as Appendix "A".

JURISDICTION

Petitioner has improperly invoked this Court's jurisdiction under 28 U.S.C. § 1257(3). The California Supreme Court's decision in *County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees' Association, Local 660* (1985), 38 Cal.3d 564, rests on substantial and independent state grounds, and thus is not reviewable by this Court. Further, the federal question, through which Petitioner seeks to assert this Court's jurisdiction, was first raised below in a Petition for Rehearing to the California Supreme Court. (Petitioner's Petition for Rehearing is reprinted in its Brief as Appendix "F".) Thus, Petitioner did not preserve the federal question below in that Petitioner failed to raise the federal question in a timely manner.

STATUTORY PROVISIONS INVOLVED

In addition to the statutes referred to in the Petition, Respondents would have this Court take notice of California Water Code §§ 13370, et seq., which Code sections implement the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376.

STATEMENT OF THE CASE

Los Angeles County Employees Association, Local 660, Service Employees' International Union, AFL-CIO (hereafter referred to as "Union" or "Respondent") is the certified bargaining representative of the blue collar employees employed by the County Sanitation District (hereafter referred to as "District" or "Petitioner"). The District is a local public agency, and its labor relations are governed by the Meyers-Milias-Brown Act (hereafter referred to as "MMBA"), California Government Code §§ 3500, et seq. Pursuant to the provisions of the MMBA, the District and the Union negotiate on wages, benefits and other terms and conditions of employment, and if the parties reach agreement on these subjects of bargaining, the District and the Union enter into a binding collective bargaining agreement. See *Glendale City Employees Association vs. City of Glendale* (1975), 15 Cal.3d 328, 124 Cal.Rptr. 513, 540 P.2d 609, *cert. den.* 424 U.S. 943 (1976).

In early 1976, the District and the Union commenced negotiations for a new contract to become effective July 1, 1976. As of June 23, 1976, the major issues separating the parties involved the District's proposals for reduced overtime, salary increases, binding arbitration of grievances, and shower and change time. After rejecting the District's final offer, the employees voted on July 1, 1976 to strike the District. On July 5, 1976, the employees of the District commenced a strike which was in effect until July 16, 1976.

Commencing with the first day of the strike and continuing throughout the work stoppage, the District assigned all management and a substantial number of professional and supervisory employees to be physically stationed at most of the facilities of the District so that the District would be able to maintain plant operations throughout the

period of the strike. Pursuant to this arrangement, the District was successful in maintaining plant operations throughout the period of the work stoppage.

On July 6, 1976, the District filed a Complaint for Injunction and Damages. The District was granted a Temporary Restraining Order. The strike continued after the issuance of the Temporary Restraining Order. After the strike ended, the District proceeded with the prosecution of its damage claim in this action.

Following a bench trial, the Superior Court held that the strike was a public employee strike and was, therefore, unlawful, and that the Union was liable for damages. (Conclusion of Law No. 1 of the Superior Court's Findings of Fact and Conclusions of Law, reprinted as Appendix "C" in Petitioner's Brief.) Respondents appealed this judgment to the Court of Appeal of the State of California, asserting, *inter alia,* that strikes by public employees in California should no longer be considered unlawful under California common law. Petitioner opposed Respondent's appeal, arguing that strikes by public employees in California should continue to be construed as unlawful.[1]

In its Opinion, the California Court of Appeal upheld the liability of Respondents. However, while finding itself bound by the common law rule that denies public employees the right to strike, the Court of Appeal noted that recent decisions of the state Supreme Court had cast doubt on the continuing validity of this common law rule. *County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees Association, Local 660*

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[1]Respondents' Opening Brief in the Court of Appeal of the State of California is reprinted herein as Appendix "A". Petitioner's Brief to the Court of Appeal is reprinted herein as Appendix "B".

(1983), 147 Cal.App.3d 990, 995-997, 195 Cal.Rptr. 567 (withdrawn from publication).[2]

Respondents filed a Petition for Hearing with the California Supreme Court in November of 1983, seeking review of the Court of Appeal's decision. In their Petition for Hearing, Respondents argued, *inter alia,* that the California Supreme Court should overturn the California common law rule outlawing strikes by public sector employees.[3] Petitioner filed an Answer to the Petition for Hearing in December 1983, asserting that the common law rule on the illegality of public employee strikes should be maintained.[4]

The California Supreme Court granted a hearing in January 1984, and on May 13, 1985, the Court issued its decision.[5] The California Supreme Court reversed the Court of Appeal and held that, in the absence of a specific legislative prohibition, public employees in California have the right to strike unless the strike creates a "substantial and imminent threat" to the health or safety of the public.

On May 24, 1984, the District filed a Petition for Rehearing before the California Supreme Court raising, for the first time, the District's contention that strikes by District employees violate the Federal Water Pollution

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[2]The Court of Appeal's decision is reprinted as Appendix "B" in Petitioner's Brief.

[3]Respondents' Petition for Hearing in the Supreme Court of the State of California is reprinted herein as Appendix "C".

[4]Petitioner's Answer to Petition for Hearing in the California Supreme court is reprinted herein as Exhibit "D".

[5]The California Supreme Court's decision is reprinted as Appendix "A" in Petitioner's Brief.

Control Act and the Federal Resource Conservation and Recovery Act of 1976.[6]

On June 4, 1985, Respondents filed their Answer to Petition for Rehearing with the California Supreme Court, arguing, *inter alia,* that, pursuant to California practice and procedure, Petitioner had not raised the issue of the federal statutes in a timely manner.[7]

On June 27, 1985, the California Supreme Court denied the District's Petition for Rehearing.[8]

REASONS FOR DENYING THE WRIT

I

THE FEDERAL QUESTION URGED BY PETITIONER WAS NOT PRESENTED TO THE COURT IN A TIMELY MANNER.

Petitioner challenges the decision of the California Supreme Court as being in substantial conflict with the Federal Water Pollution Control Act ("Pollution Control Act") and the Federal Resource Conservation and Recovery Act of 1976 ("Recovery Act"). However, Petitioner raised the applicability of the Pollution Control Act and the Recovery Act to strikes by sanitation workers for the first time in its Petition for Rehearing, filed with the California Supreme Court.

In order to obtain review of a state court decision in this Court pursuant to 28 U.S.C. § 1257, it must affirma-

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[6]Petitioner's Petition for Rehearing in the California Supreme Court is reprinted as Appendix "F" in Petitioner's Brief.

[7]Respondents' Answer to Petition for Rehearing in the California Supreme Court is reprinted herein as Appendix "E".

[8]The California Supreme Court's denial of the District's Petition for Rehearing is reprinted as Appendix "G" in Petitioner's Brief.

tively appear that a substantial federal question was presented to the state court in a timely fashion and was passed upon by that court. *Cardinale vs. Louisiana* (1969), 394 U.S. 437, 439, 89 S.Ct. 1161, 1163. Raising the federal question for the first time in a petition for rehearing addressed to the highest state court generally is insufficient to assert the jurisdiction of this Court unless the state court actually entertained the petition and expressly decided the question. *Hanson vs. Denckla* (1958), 357 U.S. 235, 243-244, 78 S.Ct. 1228, 1234; *Radio Station WOW, Inc. vs. Johnson* (1945), 326 U.S. 120, 128; 65 S.Ct. 1475, 1480. It is readily apparent from the California Supreme Court's denial of Petitioner's Petition for Rehearing that said court did not expressly consider the federal question which Petitioner now urges upon this Court. (See Appendix "G" to Petitioner's Brief.) Petitioner's failure to raise the federal question, which it now urges upon this Court, in a timely fashion below, constitutes a waiver of that issue for the purposes of review by this Court.

Petitioner cites *Brinkerhoff-Faris Trust Company vs. Hill* (1930), 281 U.S. 673, and *Missouri vs. Gehner* (1930), 281 U.S. 313, *disapproved on other grounds, United States vs. Atlas Life Insurance Company* (1964), 381 U.S. 233, for the proposition that a federal question may be raised for the first time in a petition for rehearing when the federal question is created by an unexpected decision of the state court which gave petitioner no prior opportunity to anticipate or assert the particular federal question. An examination of the facts of *Brinkerhoff-Faris* and *Missouri* shows, however, that this principle applies only in situations where the basis of the state court's decision had not been suggested nor litigated by any party to the litigation. This exception to the timeliness rule does not apply in the instant case.

Petitioner disingenuously asserts that it was surprised by the decision of the California Supreme Court. It is clear from a reading of all the Briefs filed in the California state courts that the legality of strikes by public employees was an issue litigated by the parties from the commencement of this action with the trial court and throughout the appellate process. Respondents urged to the state Court of Appeal and the state Supreme Court that the common law rule outlawing strikes by public employees in California should be changed. In fact, Respondents specifically argued for the standard which the California Supreme Court ultimately adopted in its decision. (See Respondents' Petition for Hearing filed with the California Supreme Court, Appendix "C" herein.) Moreover, Petitioner argued, in its Briefs before the state appellate court and the state Supreme Court, that the common law rule outlawing strikes by public sector employees should be maintained. (See Appendices "B" and "D" herein.)

It is clear that a litigant who raises a federal question for the first time in a petition for rehearing with a state's highest court can only preserve his right to review by this Court if the litigant can show that the decision of the state court was a surprise and could not have been reasonably anticipated from prior decisions. *Herndon vs. Georgia* (1935), 295 U.S. 441, 55 S.Ct. 794. There was no surprise in this case. Prior to the decision of the California Supreme Court in the instant case, the trend of the recent decisions of that court has been to carve out an ever-growing number of exceptions to the common law rule outlawing strikes by public employees. See *City and County of San Francisco vs. Cooper* (1975), 13 Cal.3d 898 (California Supreme Court held that a labor agreement resulting from a strike by public sector workers was valid and enforceable); *San Diego Teachers Association vs. Superior Court of San Diego* (1979), 24 Cal.3d 1 (legality of

public employees strikes was said to be an open question); *El Rancho Unified School District vs. National Education Association* (1983), 33 Cal.3d 946 (California Supreme Court divested superior courts of the jurisdiction to entertain a complaint for damages filed by a school district against a union which had led a strike of public school employees); *International Brotherhood of Electrical Workers vs. City of Gridley* (1983), 34 Cal.3d 191 (California Supreme Court held that it was unlawful for the City to terminate the certification of a union which had engaged in a strike involving public sector workers).

Indeed, the decision of the Court of Appeal in this matter, while upholding the trial court's award of damages, questioned the vitality of the common law rule outlawing strikes by public employees. (See the decision of the appellate court at pp. 4-7, reprinted in Petitioner's Brief as Appendix "B".)

Thus, the decision of the California Supreme Court was not unexpected and should have been anticipated by Petitioner, as this decision was clearly foreshadowed by prior recent decisions of that court, by the opinion of the state Court of Appeal, and by the litigants' Briefs to both appellate bodies. Accordingly, the cases of *Brinkerhoff-Faris Trust Company vs. Hill, supra,* and *Missouri vs. Gehner, supra,* are not applicable. Having failed to raise the federal question in a timely manner before the state court, Petitioner has, therefore, waived its right to review by this Court.

II

THE PETITION DOES NOT RAISE A REAL AND SUBSTANTIAL FEDERAL QUESTION.

The federal question urged by Petitioner is an abstract issue that does not affect the rights of the litigants in this proceeding. Petitioner argues in the hypothetical as to

how the decision of the California Supreme Court may, *in the future*, conflict with the Pollution Control Act and the Recovery Act. It is clear from the facts of the instant case that the District was able to maintain its facilities and operations throughout the strike, and thereby avoided the possibility of violating the Pollution Control Act and the Recovery Act. *County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees' Association, Local 660* (1985), 38 Cal.3d 564, 568. Accordingly, no actual case or controversy is present in the instant case.

Assuming, *arguendo*, that Petitioner had raised its federal question below in a timely manner, Petitioner must show that a decision on the federal question is necessary to this Court's disposition of the case. *Lear, Inc. vs. Adkins* (1969), 395 U.S. 653, 89 S.Ct. 1902; *Southwest Bell Telephone Company vs. Oklahoma* (1938), 303 U.S. 206, 212-213, 58 S.Ct. 528, 530. In order to secure the review of this Court, Petitioner must seek a declaration of rights as they stand, not on rights which may arise in the future, and there must be an actual controversy over an issue, not a desire for an abstract declaration of law. *In re Summers* (1945), 325 U.S. 561, 567, 65 S.Ct. 1307.

Petitioner can show no violation of the Pollution Control Act or the Recovery Act arising out of the strike by the District's employees in 1976. The District was able to maintain and operate its plants and facilities throughout the strike, Thus, the federal question raised by Petitioner does not arise from or have any application to the facts of this case. As the District was able to maintain plant operations by utilizing management personnel throughout the strike, there was no discharge of pollutants into the waterways, and, therefore, no violation of the Pollution Control Act. Similarly, as the District was able to operate

its landfills with management personnel, the possibility of a violation of the Recovery Act did not arise.

The federal question urged by Petitioner upon this Court is thus unnecessary to a determination of this case. It is improper for Petitioner to seek this Court's review of a hypothetical question which does not affect the rights of these litigants.

III

THE DECISION OF THE CALIFORNIA SUPREME COURT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

It is well accepted that this Court will not review a decision of a state court resting upon adequate and independent state grounds. *Bell vs. Maryland* (1964), 378 U.S. 226, 84 S.Ct. 1814; *Smith vs. Smith* (1961), 366 U.S. 210, 81 S.Ct. 1050. Even if a judgment of a state court rests upon two grounds, one federal and the other non-federal, this Court is without jurisdiction to review the case if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Jankovich v. Indiana Toll Road Commission* (1965), 379 U.S. 487, 85 S.Ct. 493. The decision of the California Supreme Court in this matter to reverse its prior decision and legalize strikes by public employees within California rests firmly on independent and adequate state grounds.

A. THE REGULATION OF LOCAL PUBLIC SECTOR LABOR RELATIONS IS A MATTER OF STATE CONCERN.

The National Labor Relations Act (29 U.S.C. §§ 151, et seq.) was enacted by Congress to regulate labor relations within the United States. The National Labor Relations Act ("NLRA") specifically excludes from NLRA coverage state governments and their political subdivisions.

(29 U.S.C. § 152(2).) In *Abood vs. Detroit Board of Education* (1977), 431 U.S. 209, 223, 79 S.Ct. 1782, 1793, this Court interpreted this exclusion as leaving the regulation of the labor relations of state and local governments to the state. *Accord, City of Saginaw vs. SEIU Local 446-M* (6th Cir. 1983), 720 F.2d 459, 462; *Local Union No. 370, etc. vs. Detrick* (9th Cir. 1979), 592 F.2d 1045, 1046; *Crilly vs. Southeastern Pennsylvania Transportation Authority* (3rd Cir. 1976), 529 F.2d 1359. Accordingly, the California Supreme Court's decision to legalize strikes by public employees was a proper exercise of that court's authority to regulate labor relations within the State of California.

In *Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen* (1960), 54 Cal.2d 684, the California Supreme Court stated *in dicta* that in the absence of specific legislative authorization, strikes by public employees were considered illegal. *Los Angeles Metropolitan Transit Authority* was decided at a time when public employees in the State of California did not generally have the right to organize collectively or to bargain over their terms of employment. In 1968, the California State Legislature passed the Meyers-Milias-Brown Act recognizing the right of public employees to organize and to bargain collectively. See California Government Code §§ 3500, et seq. On its face, the MMBA neither denied nor granted local governmental employees the right to strike. Over the years in California, the law of public sector labor relations has continued to develop. It was in the light of these ongoing changes that the California Supreme Court decided, in the instant matter, to exercise its authority to

change the state common law and make strikes by public sector employees legal.

It is well established in California that the California Supreme Court has the right to redefine, modify or even abolish a common law rule. *Rodriguez v. Bethlehem Steel* (1974), 12 Cal.3d 382, 394; *Green vs. Superior Court* (1974), 10 Cal.3d 616, 629. By legalizing strikes by public sector employees within the State of California, the California Supreme Court has exercised the power of the California courts to alter the California common law, coupled with the power of the state courts to regulate the labor relations of public employees within this state.

Accordingly, this court should deny Petitioner's request to review the California Supreme Court's decision in this matter, as that decision rests upon adequate and independent state grounds.

B. PETITIONER'S RAISING OF A NEW ISSUE IN ITS PETITION FOR REHEARING WITH THE CALIFORNIA SUPREME COURT DOES NOT ACCORD WITH STATE PRACTICE.

The principle that this Court will not review state court judgments resting upon independent and adequate state grounds, even where those judgments also decide federal questions applies not only in cases involving state substantive grounds, but also in cases involving state procedural grounds. *Henry vs. Mississippi* (1965), 379 U.S. 443, 85 S.Ct. 364, *reh. den.* 380 U.S. 926, 85 S.Ct. 878. Thus, the failure to timely raise a federal issue in accordance with state practice can constitute a waiver of that point, which bars review by this Court. *Parker vs. North Carolina* (1970), 397 U.S. 790, 90 S.Ct. 1458.

It is the long-standing practice and procedure within California that the appellate courts will not grant a rehearing on points newly urged in a petition for rehear-

ing. It is the duty of counsel to see that all points are properly presented in the original briefs or argument, before submission. *People vs. Payne* (1977), 75 Cal.App.3d 601, 605; *City of Saratoga vs. Huff* (1972), 24 Cal.App.3d 978, 1006; *Smith vs. Crocker First National Bank* (1957), 152 Cal.App.2d 832, 836; *Esterbrook Company vs. Industrial Accident Commission* (1918), 177 Cal. 767, 771; *Prince vs. Hill* (1915), 170 Cal. 193, 195; *Andrews vs. Mokokelumne Hill Company* (1857), 7 Cal. 330, 333.

Relying on *Chambers vs. Mississippi* (1973), 410 U.S. 284, 290, n. 3, 93 S.Ct. 1038, and *Street vs. New York* (1969), 394 U.S. 576, 681-85, 89 S.Ct. 1354, Petitioner asserts that it is proper for this Court to review a state court's decision even if the state court has failed to articulate its denial of a federal claim raised by one of the litigants. (Pet., p. 14.) These cases, however, are inapplicable to the instant matter.

Both *Chambers* and *Street* were criminal cases involving issues of constitutional law. In *Chambers, supra,* the appellant raised as a defense his denial of due process as early as the trial court, claiming that a state evidentiary rule barring cross-examination of a witness in certain contexts denied him his due process. Appellant raised the same claim in a motion for a new trial and again on appeal to the state Supreme Court. In *Street, supra,* this Court found that the appellant had sufficiently raised a constitutional objection to a state statute during his trial and again before the state appellate courts, even though the state courts had failed to rule on this claim in their disposition of appellant's case.

In the instant case, Petitioner raised its federal claim for the first time in its Petition for Rehearing with the California Supreme Court. Both this Court and the California courts have long maintained that, absent extraordi-

nary circumstances, a claim raised for the first time in a petition for rehearing will not be reviewed. *Hanson vs. Denckla* (1958), 357 U.S. 235; *Esterbrook Company vs. Industrial Accident Commission* (1918), 177 Cal. 767, 771.

Petitioner has made no argument that the California Supreme Court, in denying a rehearing, applied this principle in an overly stringent manner in an attempt to bypass adjudicating the federal claim urged by Petitioner. Thus, Petitioner has not met its burden of affirmatively rebutting this Court's presumption that the state court's silence on the federal claim was due to Petitioner's failure to timely present this claim. See *Street vs. New York* (1969), 394 U.S. 576. Moreover, Petitioner has also failed to show that it was necessary for the state court to reach the federal claim in order to decide the case. *Southwest Bell Telephone Company vs. Oklahoma* (1938), 303 U.S. 206. Absent such an affirmative showing, this Court should decline to review Petitioner's claim.

IV

THE STANDARD ADOPTED BY THE CALIFORNIA SUPREME COURT IS NOT REPUGNANT NOR IN CONFLICT WITH THE FEDERAL STATUTES.

In its decision, the California Supreme Court declared that "strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial imminent threat to the health or safety of the public." *County Sanitation District No. 2, supra,* 38 Cal.3d at p. 586. Contrary to Petitioner's assertions, this standard does not conflict with the Pollution Control Act or the Recovery Act.

It is the purpose of both the Pollution Control Act and the Recovery Act to regulate open landfills and the discharge of pollutants so as to protect the environment

and the health and safety of the public. 33 U.S.C. § 1251; 42 U.S.C. § 6902. The standard adopted by the California Supreme Court in legalizing strikes by public sector workers does not conflict with these purposes.[9]

The potential environmental catastrophes which Petitioner claims would result from public sector strikes fall squarely within the standard enunciated by the California Supreme Court in this matter. Such catastrophes would necessarily constitute a "substantial and imminent threat to the health or safety of the public," and such a strike could, therefore, be enjoined. The California Supreme Court noted in its decision that there was no showing by the District that the health and safety of the public was at any time threatened. The Court noted that had such a showing been made, the trial court would then have had the authority to declare such a strike illegal and to enjoin it. *County Sanitation District No. 2 of Los Angeles County vs. Los Angeles County Employees' Association, Local 660, supra,* 38 Cal.3d at p. 587, n. 35.

Additionally, Petitioner has made no showing that the decision of the California Supreme Court in this case has obstructed the remedial and enforcement mechanisms provided in the Pollution Control Act and the Recovery Act. The Pollution Control Act and the Recovery Act contain provisions for injunctions, fines and criminal penalties for those persons who violate sections of the Pollution Control Act and the Recovery Act. See, for example, 33 U.S.C. § 1319, and 42 U.S.C. § 6973. The decision of the California Supreme Court in this case does nothing to prevent either state or federal governments from exercising these remedial and enforcement powers.

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[9]It is interesting to note that Section 1321(e) of the Pollution Control Act, 33 U.S.C. § 1321(e), adopts basically the same standard for securing judicial relief against an actual or threatened discharge of hazardous substances into the nation's waterways.

These remedies have, in fact, been exercised by the state government in the context of a strike by public sector sanitation workers. In *State of California vs. City and County of San Francisco* (1979), 94 Cal.App.3d 522, both the employer and the union were subject to a substantial fine for violations of various provisions of the Pollution Control Act as implemented by the state Water Code. (California Water Code § 13370, *et seq.*) In that case, unlike the instant matter, the employer had decided not to run its facilities with management personnel during the strike by its employees. The shutdown of the sanitation facilities resulted in the discharge of pollutants into the waterways, which was the ultimate reason for the fine.

Lastly, there is nothing either in the Pollution Control Act or the Recovery Act to indicate a congressional intent to outlaw strikes by sanitation workers, be they public or private sector workers. Absent such a congressional intent, it is difficult to construe how the decision of the California Supreme Court conflicts with the Pollution Control Act or the Recovery Act. Accordingly, Petitioners have improperly sought review of the state court's decision in this matter.

V

CONCLUSION

For all the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

DATED: October 24, 1985

Respectfully submitted,

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APPENDIX A

APPENDIX A

2ND CIVIL NO.

66088

In the Court of Appeal

SECOND APPELLATE DISTRICT

State of California

COUNTY SANITATION DISTRICT NO. 2
OF LOS ANGELES COUNTY, a public agency,
Plaintiff and Respondent,

VS.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION,
LOCAL 660,
SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO;
VICTOR N. HOCHEE, HARRY GLUCK,
JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER,
GARY SCHALANDER, BILLY MANNING,
Defendants and Appellants.

Appeal from the Superior Court of Los Angeles County.
Hon. Charles H. Older, Judge.

APPELLANT'S OPENING BRIEF.

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IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

COUNTY SANITATION DISTRICT NO. 2
OF LOS ANGELES COUNTY, a public agency,
Plaintiff and Respondent,

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION,
LOCAL 660,
SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO;
VICTOR N. HOCHEE, HARRY GLUCK,
JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER,
GARY SCHALANDER, BILLY MANNING,
Defendants and Appellants.

APPELLANTS' OPENING BRIEF.

I.
PRELIMINARY STATEMENT.

On July 5, 1976, the employees of the Respondent County Sanitation District No. 2 of Los Angeles County[1] commenced a strike.

The District filed a Complaint in the Superior Court on July 6, 1976, requesting injunctive relief in the First Cause of Action. (Clerk's Transcript pp. 1 and 32.)[2] The

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[1]The Plaintiff and Respondent in the action will be referred to as the "District". The Plaintiff and Respondent is the administrative District of the Los Angeles County Sanitation Districts, consisting of a number of Districts within Los Angeles County which are under a Joint Administration Agreement. (Exh. 120.) All administrative functions and labor relations have been delegated to District No. 2. Reporter's Transcript Vol. I, p. 9. (Hereinafter, any references to the Reporter's Transcript will be referred to as "Rep. Tr. Vol.", followed by the volume and page number.)

[2]All references to the Clerk's Transcript will hereinafter be designated as "Cl. Tr.", followed by the page number.

Superior Court issued a Temporary Restraining Order on July 6, 1976, restraining the strike. (Cl. Tr. p. 21.) The Complaint was filed against the Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO[3] and seven employees of the Union. An Answer was filed to the Complaint alleging as an affirmative defense that the District had not engaged in good faith negotiations. (Cl. Tr. p. 142.) The District filed an Order to Show Cause Re Contempt on July 10, 1982, which the Superior Court set for hearing on July 27, 1976. (Cl. Tr. p. 87.)

The strike terminated on July 16, 1976. The District and the Union, sometime in the fall of 1976, entered into a stipulation that the strike was in effect on three separate days, and the Superior Court found only the Union in contempt and assessed a $1,500.00 fine.[4]

On June 12, 1979, the District filed an Amended Complaint amending the Second Cause of Action on the prayer for damages. (Cl. Tr. p. 147.) A trial was held before the Superior Court from March 18, 1981 and concluding on April 6, 1981. The Superior Court entered an Order of Intended Decision finding the Union and three employees, Hochee, Gluck and Roberts, liable and assessing compensatory damages in the amount of $246,904.00, with pre-judgment interest. (Cl. Tr. p. 426.) The Plaintiff filed Proposed Findings of Fact and Conclusions of Law. (Cl. Tr. p. 431.) The Defendants filed Objections to the Proposed Findings of Fact and Conclusions of Law and filed a Request for Special Findings.

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[3]Local 660 will hereinafter be referred to as "Union".

[4]The Clerk's Transcript does not contain the stipulation and the Order Re Contempt, as such documents have been misplaced. There is no dispute that there was such a stipulation and order, or that the Union paid the $1,500.00 fine.

(Cl. Tr. p. 443.) The Plaintiff filed a Response to the Objections and Request for Special Findings. (Cl. Tr. p. 460.) The Superior Court denied the Request for Special Findings. (Cl. Tr. p. 478.) The Superior Court signed the Findings of Fact and Conclusions of Law as submitted by the Plaintiff, without any changes, on August 13, 1981. (Cl. Tr. p. 479.) The Trial Court entered judgment against the Union and the three individuals in the amount of $246,904.00, plus $87,615.22 as pre-judgment interest from July 18, 1976 and $874.65 as costs, for the total amount of $335,393.87. (Cl. Tr. p. 488.) Judgment was entered. (Cl. Tr. p. 491.) The Union and the three individuals filed a Notice of Appeal from the Judgment. (Cl. Tr. p. 594.)

II.

SUMMARY OF FACTS.

The Union was certified by the District as the bargaining representative of the blue collar employees, consisting of approximately 500 employees of the District engaged in various classifications, such as Treatment Plant Operators, Sewer Maintenance Workers, and others.[5] In early 1976, the District and the Union commenced negotiations for a new Memorandum of Understanding to become effective July 1, 1976.[6] The bargaining revolved around

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[5]The various Memoranda of Understanding between the District and the Union set forth the classifications of employees, salary schedules, and other conditions of employment. (Exhs. 123, 355, 356, and 357.)

[6]The Union had originally been certified in three bargaining units, consisting of blue collar, technical and clerical. The technical unit was later disbanded. The Teamsters filed for decertification elections in the clerical and blue collar units, and became the certified bargaining representative in the clerical unit. However, the Union retained bargaining representation rights for the blue collar unit following an election in 1975.

many issues. As of June 23, 1976, the major issues separating the parties involved the District's proposal to reduce the amount of overtime, salary increases, binding arbitration of grievances, and shower and change time. (Rep. Tr. Vol. 1, pp. 141-173; Vol. 3, p. 579.) The employees voted on July 1, 1976 to strike after rejecting the District's final offer. (Rep. Tr. Vol. 3, p. 595.) The employees remained on strike until July 16, 1976 (Rep. Tr. Vol. 3, p. 595), and the employees returned to work on July 17, 1976 (Rep. Tr. Vol. 3, p. 606).

Commencing with the first day of the strike and continuing on through July 17, 1976, the District assigned all management and a substantial number of professional and supervisory employees to be physically stationed at most of the facilities of the District.[7] The District assigned the management, professional and executive employees of the District to the Upstream and Desert Treatment Plants, JWPCP, and the Long Beach and San Jose Plants on a 24 hour basis, with meals brought into the JWPCP. The landfills and maintenance yards were staffed on a 12 hour basis; however, South Gate Transfer Station was closed. The management, executive and professional employees[8] were paid time and one half for all

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[7]The facilities of the District, for purposes of assignment and discussion subsequently in this Brief regarding the payment of excessive overtime and unnecessary staffing, can be divided into seven groups: (1) the maintenance yards; (2) the South Gate Transfer Station; (3) the Upstream and Desert Treatment Plants; (4) the Joint Water Pollution Control Plant ("JWPCP"), Long Beach and San Jose Plants; (5) the landfills; (6) the laboratories; and (7) the joint administrative offices.

[8]Such employees are placed in a separate category from the blue collar or clerical employees regarding their salaries and methods of overtime payment under the Salary Resolution of District. Hereinafter, for the sake of convenience, such employees will be referred to as management employees.

hours over 40 hours per week, which included the time allotted for sleeping, eating, recreation, and driving to and from restaurants for meals. (Rep. Tr. Vol. 3, pp. 674-678; Vol. 4, pp. 832, 906, 908, 918, 923, 946-947.) The employees at the landfills, including the management employees, were assigned to a 12 hour shift with overtime paid at rate of time and one half, with a 10% bonus added to the hours.[9] (Rep. Tr. Vol. 4, pp. 972-987.)

The District is administered by Joint District 2, which consists of a Board of Directors that adopts the resolutions concerning the payment of salaries for all District employees. The Board of Directors of the District annually adopted a Salary Resolution covering all employees of the District, including the managment employees. Salary Resolutions were in effect on July 1, 1975 (Exh. 127) and July 1, 1976 (Exh. 130). The Salary Resolutions provide for overtime to management employees on the basis of a formula depending on the employees' salaries, where at a specified level the amount of overtime is equal to straight time. Unlike the blue collar and clerical employees, there is no provision for a time and one half payment of overtime over 40 hours for management employees. The Salary Resolution did not provide for a 10% bonus for any employees.

The order to pay time and a half payment to the management employees was given by Parkhurst, the Chief Engineer. (Rep. Tr. Vol. 2, pp. 517-523.) The 10% bonus for the employees working at the landfills was authorized by Frank Dair, who was in charge of the landfills. (Rep. Tr. Vol. 4, pp. 987-988.)

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[9]The 10% bonus was not added onto the overtime paid, but was added onto the number of hours, thereby increasing the amount of overtime.

The Board of Directors of the District met frequently in June, July and August, 1976. (Rep. Tr. Vol. 2, pp. 525-527; Exhs. 128, 129, 131, and 198.) The Board of Directors did not at any time approve or adopt any amendment to the Salary Resolution authorizing time and one half overtime payment to the management employees, or a 10% bonus to the employees working at the landfills during the strike.

The original Complaint filed on July 6, 1976 did not specify the amount of damages, but alleged compensatory damages in the amount of $27,000.00 a day and further damages by proof, and $4,000,000.00 punitive damages. (Cl. Tr. p. 132.)

On June 12, 1979, the District filed an Amended Complaint as to the Second Cause of Action, and alleged compensatory damages in the total amount of $430,841.40, specified as (a) paid overtime in the amount of $353,796.35, (b) compensatory overtime, $18,046.64, and (c) related costs at $48,998.41, together with punitive damages in the amount of $4,000,000.00. (Cl. Tr. p. 147.)

The Plaintiff's Pre-Trial Brief stated that the District was prepared to present evidence as to compensatory damages in the amount of $400,000.00, and alleged that there should be no offset on the strikers' salaries saved by the District and that the burden of proof on any offset was on the Defendants. (Cl. Tr. p. 274.) During the course of the trial, the Plaintiff submitted exhibits with an itemization of compensatory damages in the amount of $388,704.50 (Exh. 203.)

In the Answer to Interrogatories filed on October 28, 1978, the District answered that overtime paid was in the amount of $330,973.75.

Proof was offered at the trial regarding the amount of overtime for management employees in accordance with

the Salary Resolution. (Exh. 196.) There was a dispute as to the amount of overtime saved regarding the salaries of the strikers that were not paid during the course of the strike. (Exhs. 204 and 306.)

The Union offered exhibits regarding the amount of overtime that would have been reasonable on the basis of staffing at 8 hours, 12 hours, or 14 hours per day, rather than paying the management employees on a 24 hour basis, which included time for sleeping, eating, playing cards, and otherwise not working. (Exhs. 366, 367, 368, and 369.)

The District claimed damages at overtime at time and one half for management employees where the management employees were not paid but were credited with future time off. (Exh. 364.) The District offered specifics regarding additional damages referred to as lost productive time in the amount of $32,341.04, which was not admitted by the Trial Court. (Exh. 197.)

The Trial Court, in its Intended Decision (Cl. Tr. p. 426), assessed compensatory damages on the basis of time and one half overtime to the managment employees, but disallowed the 10% bonus to the landfill employees, for a total overtime amount of $375,347.00; and allowed an offset for saved salaries, FICA payments, retirement and overtime saved for the strikers in the amount of $134,443.00, with a deduction of $6,000.00 paid by the District for health premiums for the month of July, leaving a total offset in the amount of $128,443.00. The Trial Court also awarded pre-judgment interest in the amount of $87,615.00. (Cl. Tr. pp. 440, 448.)

III.

WHETHER A PUBLIC EMPLOYEES STRIKE PROVIDES A TORT CAUSE OF ACTION FOR DAMAGES IS AN UNRESOLVED ISSUE IN CALIFORNIA.

The Trial Court followed a number of decisions of the Court of Appeal that have held that public employees in California do not have the right to strike and that there is a cause of action for damages arising out of such a strike. *Pasadena Unified School District v. Pasadena Federation of Teachers,* 72 Cal.App.3d 108 (1977). Although the California Supreme Court denied a petition for hearing in the *Pasadena Unified School District* case, the question as to whether all public employee strikes are illegal was expressly left open in *San Diego Teachers Association v. Superior Court of San Diego,* 24 Cal.3d 1 (1979).[10]

The District's cause of action for damages is inconsistent with *City and County of San Francisco v. Cooper,* 13 Cal.3d 898 (1975), where the Supreme Court held that a strike settlement agreement between San Francisco and a union was valid and enforceable. The basic inconsistency between *Cooper* and *Pasadena* is that an agreement resulting from a strike is enforceable, and yet the public agency can then sue for damages arising out of the very same strike. In *Cooper,* San Francisco was coerced, by a strike of its employees, to increase its offer by many millions of

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[10]The Supreme Court vacated the trial court's injunction against a teachers strike on the basis of preemption where the primary jurisdiction belonged to the Public Employment Relations Board. Although the Teachers Unions argued that in the alternative, the common law should be based on a right to engage in a peaceful strike, the Supreme Court expressly declined to resolve such an issue. See specifically that dissent of Justice Richardson, where he criticizes the majority for leaving the issue open in view of the Supreme Court's prior refusal to grant a hearing in *Pasadena.*

dollars. Clearly, such an added increase in salaries constitutes damages to San Francisco, and under *Pasadena,* there would be a cause of action. How can San Francisco, on one hand, sue for such damages, and on the other hand, be held liable on the enforceable agreement for the increased salaries?

In *International Brotherhood of Electrical Workers v. City of Gridley,* 121 Cal.App.3d 169 (1981), the Court of Appeal held that a strike of city employees was illegal and that the City could discharge the employees and terminate the union's certification as the bargaining representative of such employees. The Supreme Court has granted a hearing."[11]

In *El Rancho Unified School District v. National Education Association,* 129 Cal.App.3d 177 (1982), the Court of Appeal in Division Three, Second Appellate District, held that the school district did not have a cause of action for injunctive relief based on the primary jurisdiction of the Public Employee Relations Board, but that the district did have a cause of action for damages, and stated:

> "If the well settled rule denying public employees the right to strike no longer represents the view of our Supreme Court, it is the province of that Court to say so. Its declination in *San Diego* to pass on the question adds nothing to its earlier decision similarly declining to resolve the question."

The Supreme Court has granted a hearing.[12]

There is a fundamental distinction between a right to obtain equitable injunctive relief restraining a strike, and obtaining damages against a union and employees of the union, as occurred in this case. See *City of Fairmont v.*

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[11]Oral argument was held on December 6, 1982.

[12]Oral argument was held on February 7, 1983.

RWDSU, 283 S.E.2d 589 (1980), where the West Virginia Appellate Court held there was no common law right to damages based on a public employees strike. See also *Lamphere Schools v. Lamphere Federation of Teachers,* 400 Mich. 104, 252 N.W.2d 1818 (1977), where the Michigan Court held that in the absence of specific legislation, there was no common law right to damages. The Michigan Supreme Court found a basic distinction between a right of injunctive relief concerning a strike that is against public policy, and the ingredients of a common law tort action, under the classic requirements of "duty", "breach of duty" and "monetary damages", constituting the triad of traditional tort law. The Michigan Supreme Court stated:

> "Furthermore, the ultimate legislative goal is to achieve a prompt, fair resolution of disputes while avoiding the disruption of the educational process. To recognize alternative tort remedies would result in a substantial negative impact upon such purposes. It would encourage the teachers' and school board's inaction. Eventual settlements could be prolonged pending the resolution of multiple tort claims and counterclaims. The inevitable result would be to create labor law logjams in our courts, and, at the same time, to exacerbate labor-management disputes."

A. A Cause of Action for Damages Would Be Contrary to the Public Policy of California Under the Meyers-Milias-Brown Act (Government Code Sections 3500, *et al.*), Which Is to Encourage Resolutions of Disputes Between Public Agencies and Their Employees.

Under *Cooper,* following a strike, San Francisco agreed to a settlement in the approximate additional amount of $4,000,000.00 for the fiscal year. Logically, under a cause of action for damages, the city could sue the union for the additional $4,000,000.00. It is difficult to reconcile the

validity of the contract calling for the increased salaries and still allow the city to sue for damages arising out of the strike. Therefore, the dispute would remain unsettled while the parties litigated in court.

As a matter of public policy, a cause of action for damages can only increase the difficulties in the resolution of the labor dispute. A union and employees in a strong economic position will remain on strike until the public agency agrees, as part of a settlement, to provide amnesty and a full release as to any damages.

The basis for a common law cause of action on damages involves itself with the concept of a "conspiracy", which has long been disregarded in California.[13]

To disallow a cause of action for damages would not displace the right of the District or any public agency to seek equitable relief, where there is an actual danger to the health and welfare of the community.

B. The Cases Holding That the Common Law Prohibits a Public Employees Strike and Subjects the Union and the Employees to Damages Are Not Consistent With Modern Society, and the California Courts Have Consistently Modified or Drastically Changed the Common Law to Meet the Needs of Our Current Society.

The Supreme Court, in *Muskopf v. Corning Hospital District,* 55 Cal.2d 211 (1961), changed the common law on sovereign immunity regarding lawsuits; and in *Li v. Yellow Cab Co.,* 13 Cal.3d 804 (1975), the Supreme Court

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[13]In *Pasadena,* the Court found a common law tort claim for damages based on the holding that there was a contract between the individual teacher and the school district which the union attempted to disrupt by a strike. In this case, there was no contract of employment between the employees and the District when the strike commenced.

changed the common law on contributory negligence in torts and applied a modern society concept of allowing damages on comparative negligence, and in *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal.3d 382 (1974), changed the common law on the right to sue for loss of consortium on a tort action. In *Rodriguez,* the Supreme Court stated that:

> "... whenever an old rule is found unsuited to present conditions or unsound it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice...."

This case presents, apparently for the first time, a complete record regarding the nature and history of negotiations between the public agency and the union regarding the realities of public employee bargaining and strikes.[14] The blue collar employees were faced in the 1974 negotiations with the District demand to reduce a substantial number of employees from a 48 hour week to a 40 hour week, thereby resulting in a substantial net loss of take-home pay. After a short strike the matter was resolved, and there was a reduction to 44 hours rather than to 40 hours, with time and one half for overtime. In 1975, there was a further reduction, which resulted in an agreement where a substantial number of employees were reclassified and placed on a special rate.[15] In the 1976

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[14]It is estimated that there are over 1,000,000 public employees in the State of California, and in 1979 there were 79 strikes by public employees against the State and local governments, involving 39,076 employees, resulting in 602,408 idle man-days. In 1980, there were 46 public employee strikes in California, involving 20,045 employees, resulting in 160,474 idle man-days. (*California Public Employee Relations* No. 48, March, 1981.)

[15]Such rate is referred to as the "Y" rate, where the employee's salary is fixed at a higher rate than the classification salary in the agreement.

negotiations, the employees were faced with further loss of take-home pay. Further, the employees in the landfill (approximately 40% of the unit) did not receive any rest periods or any time for changes and shower time during the work day, whereas the other employees did receive such time, as well as a 15 minute rest break in the morning and in the afternoon. Also, the District proposed to remove the provision in the 1975 Agreement for binding arbitration of terminations and suspensions. On June 23, 1976, the District made a final offer of a general 4.5% increase and a 2.5% increase for Y rated employees, with no change in shower, change and rest time for the landfill employees. On July 1, the District made a new offer, consisting of a 5.1% increase and a 2.5% increase to the Y rated employees, with a total of 40 hours in the year of overtime to the employees who had their overtime eliminated. However, the District negotiator, Thompson, made this offer only on the condition that the employee negotiating committee recommend the settlement to the membership, and that if the offer was not recommended, then the only offer on the table was the June 23 offer of a 4.5% increase, unless the treatment plant operators gave up their change and shower time, and in such event the offer would be increased to 5.1%. The employee negotiating committee, consisting of rank and file employees, refused to make such a recommendation, and therefore presented the June 23 proposal to the membership, which rejected it by a secret ballot vote of 280 to 70, and the employees voted to go out on strike. (Rep. Tr. Vol. 3, pp. 565-595.)

The District's proposal of June 23 was the only proposal that could be presented to the membership by virtue of the District's position that the committee had to make a recommendation in favor of the second proposal of July 1. The result was that a number of the Y rated employees whose overtime hours would be reduced would end up with virtually no salary increase for the year, and to

aggravate the matter, many of such employees had received no salary increase or a minimal increase in 1975. (Exh. 354; see also Memoranda of Understanding, Exhs. 355, 356 and 357.) in 1975, a number of such employees actually took a substantial decrease in take-home pay, and by the District's proposal prior to the strike, many of such employees received as little as a $10.00 a month increase, and those who were Y rated and also on a 48 hour week would have received a loss in pay based on a 2.5% offer.[16]

The present state of confusing inconsistencies on the question of the common law right to strike should be changed to reflect the more enlightened view that fairness dictates that public employees should not be subjected to damages when they withhold their services.

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[16]For example, a Sewer Maintenance Worker (probably one of the most difficult jobs due to the inherent nature of the work) received $1,123.00 per month in 1973, $1,163.00 per month in 1974, and a drop to $1,113.00 per month in 1975. In 1976, based on a 5.1% increase, he would receive $1,128.00 per month (amounting to a $15.00 per month increase after losing $50.00 per month in 1975). For the period 1973-1976, he gained 1% in salary increases. The Court can take judicial notice that this was a period of substantial inflationary fluctuations in our economy. The question is, under the common law under such adverse conditions, does the Sewer Maintenance Worker, as a public employee, have to accept the District's final offer, which he considers to be unfair and unjust, or terminate his employment, or can he engage in a peaceful strike to gain further salary without subjecting himself, his family, his assets, and his Union to substantial damages as found by the Trial Court in this case? The principle on modifying or changing the common law should be applied. See *Butcher v. Superior Court of Orange County (Forte),* 139 Cal.App.3d 58 (1983). In addition, the Union's employees were held personally liable for performing their work, which brings back the outmoded theory of "conspiracy", which has no place in the modern common law.

C. The District Did Not Engage in Fair Bargaining, and Therefore the Employees Had the Right to Engage in Economic Action in Order to Obtain a Reasonable Settlement.

The District made an offer on June 23, then increased its offer on July 1, but only on the condition that the negotiating committee recommend the July 1 offer. Such tactics on the part of the District constituted an unfair labor practice and were not good faith bargaining, and violated the Meyers-Milias-Brown Act. In *Stationary Engineers v. San Juan Suburban Water District,* 90 Cal.App.3d 796 (1979), the majority of Justices, and particularly concurring Justice Reynoso, placed a strong emphasis on the public employer's bargaining tactics and whether the employer's conduct provoked the strike.

D. The Claim for Damages for a Peaceful Public Employees Strike Will Deprive the Employees and the Union of Basic Constitutional Rights Under the California Constitution.

The California Supreme Court has held on numerous occasions that some constitutional issues will be decided under the California Constitution independent of the United States Constitution. See *Committee to Defend Reproductive Rights v. Cory,* 29 Cal.3d 252 (1981).

The California Supreme Court has held that under the California Constitution, there are rights of association and equal protection under the law. The right to associate into a union and to peacefully withdraw services from a public employer constitutes a basic right of freedom of assembly and speech, and further, since private sector employees have the right to strike, such a deprivation deprives public employees of equal protection under the

law.[17] See *Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers,* 51 Cal.2d 766 (1964); *Bagley v. Washington Township Hospital District,* 64 Cal.2d 499 (1964); and *Robins v. Pruneyard Shopping Center,* 23 Cal.3d 899 (1977), affirmed 100 S.Ct. 2035 (1980).

IV.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING EXCESSIVE, UNREASONABLE AND UNLAWFUL COMPENSATORY DAMAGES.

A. The Trial Court Committed Error in Allowing $18,046.54 as Compensatory Time Based on Time and a Half for Management Employees.

The Trial Court allowed $18,046.54 as compensatory overtime credited to employees based on time and one half.[18] Compensatory time off at time and one half was

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[17]There is no contention that the strike was other than peaceful. The Complaint and the Declarations requesting a Temporary Restraining Order and the Preliminary Injunction showed that there were pickets and that the Union was engaged in a strike, but nowhere was it alleged that there was any violence or blocking on ingress or egress, or that in any manner the strike was other than peaceful. (Cl. Tr. pp. 1, 13, 21, 32, 44, 55; see also Order to Show Cause Re Contempt, Cl. Tr. p. 87.) The testimony of District witnesses clearly established that the employees, including the management employees, came and went from the various facilities without any interference from the strikers, and that at a number of locations there was no picketing. A Temporary Restraining Order was issued and the Trial Court allowed damages as a "clean up" remedy on a violation of the injunction. There is no precedent or authority for such a unique damage remedy since there is a different purpose and burden of proof regarding a violation of an injunction. See *Stafford v. United Farm Workers,* 1 Cal.S.Ct., 1/27/83.

[18]The validity of paying time and one half versus straight time as set forth in the Salary Resolution will be discussed under a separate section of this Brief. If the District is required to follow the Salary

established at $15,615.40. The District's own Exhibit 194 established the value of compensatory hours earned at time and one half at $16,040.36.

Don Wahle, in charge of Payroll for the District, testified that there are no records kept by the District that establish in any way whether any of the employees actually took time off, and if so, in what amount. (Rep. Tr. Vol. 5, p. 1134.) Thompson testified that the District had no knowledge that the time was ever taken by any employees (Rep. Tr. Vol. 1, p. 249); that there was no compensation time policy and that there were no records kept as to whether any of the employees took time off, or whether there were any replacements; that there would not be any cost to the District if the employees who took time off were not replaced.[19] (Rep. Tr. Vol. 2, pp. 529-536); and that it was only on infrequent occasions that there are replacements, and without replacements there is no additional pay, and therefore there is no cost to the District if there are no replacements. (Rep. Tr. Vol. 5, p. 1242, referring to deposition of Thompson, p. 143, line 21.) The testimony is uncontradicted that there are no records and no evidence that any replacements were ever hired at any time for the employees who were credited with compensation time off, or that such compensation time was actually taken, and if so, in what amounts. In the absence of such evidence there is no showing of any loss to the District in

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Resolution, then the amount of compensation time based on the Salary Resolution would be $11,700.00 (Exh. 364; Rep. Tr. Vol. 3, p. 480.)

[19]In the deposition of Thompson, he testified:

> "Q. Right. But unless the District had to hire an extra person for a replacement, there would not be an additional labor cost to the District when a person takes comp time off; is that correct?
>
> A. That's true."

the amount of $16,040.36; this amount was improperly awarded by the Trial Court as compensatory damages.

B. The Trial Court Committed Prejudicial Error in Allowing Compensatory Damages to Management Employees at Time and One Half When the Salary Resolution of the District Provided for Straight Time and the Board of Directors of the District Did Not at Any Time Amend the Salary Ordinance or Authorize the Payment of Time and One Half.

The District, in its Amended Complaint filed on June 12, 1979 (Cl. Tr. p. 147), alleges that the District paid overtime in the amount of $363,796.35.

The District's Exhs. 194 and 203, prepared by an accountant of the District, show total overtime expense in the amount of $331,386.00. The Trial Court awarded overtime paid, excluding the 10% bonus for the landfills, in the amount of $375,347.00. However, the Trial Court apparently included the $55,080.00 as out-of-pocket expenses in this total amount. Although the Trial Court did not specify the basis of his calculations, it is clear that he awarded overtime, including compensatory time off and including FICA expenses, based on time and one half. The only amount that the District could pay on overtime under its Salary Resolution that would constitute a lawful expenditure would have been in the amount of $241,174.00 instead of $320,267.00.

There should be a reduction from the overtime assessed in the amount of $90,793.00. With this reduction only, the maximum judgment should be $156,111.00. (The amount of overtime legally allowed under the Salary Resolution less the amount of compensatory time erroneously included by the Trial Court, less the offsets.)

The testimony is uncontradicted that the authority for authorizing salaries for any District employees is exclu-

sively vested in the Board of Directors of the District. All District personnel, including Parkhurst, Wahle, and Thompson, were required to follow the Salary Resolution on salaries. (Rep. Tr. Vol. 5, p. 1125; testimony of Thompson, Rep. Tr. Vol. 2, pp. 541-542; deposition of Thompson, p. 114.) The Board of Directors has the exclusive authority to determine the amount of salaries paid to its employees. Specifically, Health and Safety Code Section 6481 provides that: "The Board is the governing power of the District, and exercises all District powers, except the making of an assessment roll in the first instance."

The Salary Resolution effective July 1, 1976 (Exh. 130), Section 5.1B, specifies the amount and the formula to be used in paying overtime to management:

> "If such employee's basis salary is $1,754.00 per month or more, the rate for compensation for overtime shall be the straight time rate."

The Salary Resolution, Section 5.1B, effective July 1, 1975 (Exh. 127), in Section 5.1B, contained the same provision as to straight time for overtime.

An employee earning less than the specified amount is paid on a formula. There was no provision in the Salary Resolutions effective July 1, 1975 or July 1, 1976 that authorized the payment of time and one half to the management employees. In fact, the Salary Resolutions in effect specifically set forth a formula and provide that for employees over a certain rate, the amount of compensation for overtime shall be straight time. In spite of the clear language of the Salary Resolution, the Trial Court awarded compensatory damages based on time and one half overtime paid to the management employees. Dair, in charge of the landfulls, testified that he was aware of the Salary Resolution regarding overtime, but he was instructed to tell the employees that they would be paid at

time and one half for time worked in excess of 40 hours although normally no overtime is paid to managerial employees. (Rep. Tr. Vol. 4, pp. 979-982.) Don Wahle, in charge of Payroll, testified that he knew that he was required to follow the Salary Resolution on overtime; that there was no authority in the Salary Resolution to pay the time and one half to the management employees; and that the Board of Directors had not given him such authority. However, he authorized the time and one half and had the checks issued based on instructions from Thompson and Parkhurst. Although he knew it was contrary to the Salary Resolutions, he followed orders. (Rep. Tr. Vol. 5, pp. 1125-1129.) Thompson, in charge of Personnel, testified that he was given an order by Parkhurst during the first week of the strike that all of the management employees were to receive time and one half. Thompson knew of the overtime provisions of the Salary Resolutions, and discussed the matter with Parkhurst. He then instructed Wahle upon the orders from Parkhurst. (Rep. Tr. Vol. 2, pp. 517-523.) There was no explanation as to why Parkhurst did not obtain such authority from the Board of Directors. Whether such an action paying retroactively for services already performed would have been legal is not in issue. The point is that the Board of Directors did not, at any time, adopt any resolution or amendment to the existing Salary Resolution to authorize time and one half overtime pay. In fact, the Board of Directors, on July 22, 1976, adopted the July 1, 1976 Salary Resolution containing the specific provision calling for straight time pay.

The Board was advised of the overtime, according to Thompson (Rep. Tr. Vol. 2, p. 525), and on the same day adopted the Salary Resolution of July 22, 1976 retroactive to July 1, 1976, which specifically provided for straight time pay on overtime for the management employees. The checks were issued on August 10, 1976. The

record is clear that the Board of Directors, as the exclusive authority as established by law to provide for salaries, did not take any action to approve the time and one half overtime, but on the contrary, took express action to provide for straight time pay only. Parkhurst was legally required to follow the Salary Resolutions, and any excess amounts paid were illegal.

In *Johnston v. Board of Supervisors of Marin County,* 31 Cal.2d 55 (1947), the Court held that: "When a Board of Supervisors acts in an administrative capacity, as in granting permits in a rezoning ordinance, it is bound by the terms of the ordinance until the ordinance is amended through proper legislative procedures."

In *Frates v. Burnett,* 9 Cal.App.3d 53 (1970), the Court held that: "Failure to follow the Civil Service procedures will result in an invalid discharge . . . and an administrative agency may not act in excess of its powers. *Any act so done is void.*" (Emphasis added.)

In *Martin v. Henderson,* 40 Cal.2d 583 (1953), the Supreme Court held that the State could not pay overtime demanded by two State Highway Patrol officers that was in excess of the authorizing statute providing for compensation. The Supreme Court stated:

> "That a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services, nor does it alter the case that by subsequent statutes or ordinances his duties are increased, and not his salary."

In *Longshore v. County of Ventura,* 25 Cal.3d 14 (1979), the California Supreme Court stated:

> "In a similar vein, article XI, section 10, subdivision (a), added June 2, 1970, and applicable to local entities, provides: 'A local government body may not grant extra compensation or extra allowance to a public officer, [or] public employee . . . after service has been rendered . . . or pay a claim under an agreement made without authority of law.' Thus, where statutes or ordinances in effect when overtime hours were logged provided no right to compensation therefor, the public entity may not subsequently grant it."

The Supreme Court further stated as follows:

> "We have cautioned that 'The fact that normal hours of work are established and compensating time off is provided for work beyond those hours does not, of itself, give the employee a right to payment for overtime.' (*Martin v. Henderson, supra* . . . .) A lump sum payment for unused time may not be made 'in the absence of specific statutory authority.' "

The Supreme Court concluded after a certain period of time that the claimant was not entitled to overtime pay since the authorizing ordinance did not provide for such pay.

In *Van Riessen v. City of Santa Monica,* 63 Cal.App.3d 193 (1976), the Court denied a claim by firemen for unused sick leave which had not been authorized by the salary resolution. The Court specifically noted that the firemen had failed to show the existence of any provision, ordinance or resolution which would grant them the money for unused sick leave. The Court, at page 199, upheld the basic rule that was established by *Martin,* and stated . . .

> "A public employee is entitled only to such compensation as is expressly provided by statute or ordi-

> nance regardless of the extent of services actually rendered."

The Supreme Court, in the *Longshore* case, specifically referred to the California Constitution, Article IV, Section 17 (formerly Article IV, Section 32) and Article XI, Section 10(a), which provide that:

> "A local government body may not grant extra compensation or extra allowance to a public officer or public employee . . . after service has been rendered . . ., *or pay a claim under an agreement made without authority of law.*" (Emphasis added.)

Parkhurst, who acted on his own and without authority from the Board of Directors, was responsible for violating the District's own Salary Resolution. The law is clear that damages cannot be awarded based on a plaintiff's own violation of a law or statute. See *Page v. Bakersfield Uniform, etc.,* 239 Cal.App.2d 762 (1966). The Trial Court was in error when it allowed damages based on time and one half overtime when the District was in violation of its own Salary Resolution.

Dair, in charge of the landfills, testified that he personally authorized a 10% extra bonus on all overtime hours. (Rep. Tr. Vol. 4, p. 987.) Thompson testified that there was no authority under the Salary Resolution to allow the 10% bonus. (Rep. Tr. Vol. 1, pp. 206-208.) The Trial Court accepted the Union's arguments that the 10% was not authorized by the Salary Resolution and should not be included as compensatory damages. The 10% bonus is in exactly the same category as the time and one half overtime. If Dair did not have authority to pay the 10% bonus, then Parkhurst did not have the authority to pay time and one half overtime, as both items were not authorized by the Board of Directors and the Salary Resolution.

C. The Trial Court Committed Prejudicial Error in Not Requiring Adequate Records and Verification as to Overtime Worked, and by Allowing Compensatory Damages on Overtime for Employees Who Either Did Not Work or Who Performed Work Unrelated to the Strike.

The Trial Court did not exclude any amount of overtime that was paid to employees who did not work, nor did it exclude other items based on insufficient and inadequate records. The Trial Court committed error in not requiring a more detailed accounting with adequate records that would properly exclude a number of expenses that are not properly considered as compensatory damages. District Exhibits 194 and 196 set forth the amount of overtime expense at the time and one half rate and at the Salary Resolution rate, listing the amount of overtime paid to each individual. The amounts include the 10% bonus for the employees working in the landfills. However, the Trial Court excluded the 10% and set forth that the overtime paid, excluding the 10%, was $375,347.00. (Cl. Tr. p. 426.) In this amount, the Trial Judge apparently was including the $55,080.00 in claim out-of-pocket expenses and including the compensatory time off at $16,040.00 at time and one half. (See Exh. 203.)

An accountant, Carlene Tannere, testified that she prepared the exhibits showing the overtime paid at time and one half based only on special pay reports and the back-up sheets, and no further checks were made on whether the overtime was actually worked or not, nor were other records reviewed by her. (Rep. Tr. Vol. 2, pp. 448, 466.)

The only documents used by the accountant in obtaining the amount of overtime paid on landfills were introduced into evidence as: landfills, Exhibit 138; Compton Yard, Exhibit 137; San Gabriel Field Office,

Exhibit 136; the Upstream and Desert Treatment Plants, Exhibit 135; JWPCP, Exhibit 134; and laboratories, Exhibit 137.

The timekeeping records for JWPCP (Exh. 134) simply have the name of the employee and, with very few exceptions, indicate 24 hours per day.

Exhibit 135, for the Upstream and Desert Treatment Plants, shows the number of hours per day as 16 hours or 24 hours worked, with very few exceptions. The same is true of the other exhibits, simply noting written references that the employee claimed 24, 16 or 12 hours of work each day.

The records were inherently untrustworthy, as they were based on information given by employees who themselves had a personal interest in exaggerating the amount of overtime. The back-up sheets (Exhs. 134-139) were obtained by verbal information in the field. The special pay reports (Exh. 133) that were used by the accountant for the most part stated the number of hours in a weekly summary form as a total amount of hours, without specifying the days and hours worked per day. (Exhs. 169-174.) As a matter of self-interest, such records are inadequate to support compensatory damages. For example, in the back-up sheet for the laboratories (Exh. 139), the two management employees who completed the back-up sheets were Dwayne Fisher and James Lahner. Fisher credited 26½ hours overtime to himself, and Lahner credited 91 hours overtime, and obtained overtime pay in the amount of $1,632.00.

Art Bunnell, the supervisor who has lived in a trailer 24 hours a day at the Puente Hills landfill prior to and since the strike, credited himself with 78 hours of overtime. Deering, who recorded the overtime hours, credited himself with 60 hours of overtime. (Exh. 137.) Krever, who

recorded the maintenance overtime at the San Gabriel Yard (Exh. 136), credited himself with 88 hours of overtime and collected $2,172.00. Willie Mendoza, the timekeeper at the same location, gave himself 57 hours of overtime.

Wahle, who was in charge of Payroll, gave himself 36 hours of overtime. Merck, the check managment person at JWPCP, who kept the records of overtime and phoned them in to the timekeeper, gave himself 201½ hours of overtime and collected $4,975.00. Sheila Smith, a clerical employee who kept time records, credited herself with 16 hours of overtime. Nagel, a management employee at the Upstream and Desert Treatment Plants, gave himself 200 hours of overtime and collected $4,938.00. Van Huit, in charge of the landfills, gave himself 52½ hours of overtime, although he had worked many days of overtime prior to the strike and never received overtime pay. (Rep. Tr. Vol. 2, pp. 404-405.)

A review of the back-up sheets, special pay reports and the overtime paid (Exh. 194) shows the excessive amount of overtime that was received by the high-paid management employees. For a period from July 5 to July 17, some of these employees received extra pay exceeding $4,500.00. (Avakien, $4,071.00; Bohlier, $3,066.00; Byers, $3,318.00; Chen, $3,139.00; Ekman, $3,575.00; Fuller, $4,515.00; etc.)

The Trial Court allowed compensatory damages for overtime that was not properly incurred due to the strike. For example, at the South Gate Transfer Station, two employees, Flaker and Guerrero, were given an assignment to drive a truck on a research project to San Francisco. They were paid 57½ hours of overtime, which was included in the damage award. (Rep. Tr. Vol. 2, p. 399; Exh. 188.)

McCool testified that he was on strike on only the first day. He took off the Friday, Saturday and Sunday during the strike to attend car races at Barstow. The Trial Court allowed 19 hours of overtime for the days McCool was attending the car races. (Exh. 194.)

Another example is Art Bunnell, who worked and lived at the Puente Hills landfill. (Rep. Tr. Vol. 4, p. 974.) Bunnell kept the records of the employees at the Puente Hill landfill, and he gave himself 78 hours of overtime, although he lives in a trailer at the landfill.

Valerie Hall was credited with 25 hours of overtime. (Exh. 194.) Valerie Hall was Thompson's assistant, and she took notes during negotiations. The Trial Court included the overtime of Hall without any evidence as to why or what she did to claim 25 hours overtime when there were no negotiations and therefore no notes to take during the strike.

The Trial Court allowed damages for overtime of laboratory employees. (Exhs. 137 and 194.) There was no showing as to why laboratory employees were required to or did work overtime due to the strike. There was no strike or pickets at the laboratory, and all of the laboratory employees reported to work.

1. The Maintenance Yards.

Beeken assigned the employees, including management employees, to work on a 12 hour basis at each maintenance yard. There was no evidence provided by the District as to what such employees did during the additional 4 hours of overtime, as the regular schedule at the maintenance yards was 8 hours per day. The Trial Court included all of the overtime, consisting of 4 hours per day at time and one half, at the maintenance yards. Exhibits 350, 351 and 352 show the normal staffing and that the

number of employees assigned during the strike was excessive and unnecessary.

At the San Gabriel Maintenance Yard, there were normally 16 blue collar workers who worked 8 hours a day. Only one employee went out on strike for one day. However, the District paid overtime at the San Gabriel Maintenance Yard for 725 hours.

The witness who testified as to what actually occurred at the maintenance yard during the strike was Mark Christopherson. (Rep. Tr. Vol. 3, pp. 684-714.) Christopherson testifed that he worked the regular shift, from 7:00 a.m. to 3:30 p.m., at the Palmdale yard; there was normally no one present at the yard after 3:30 p.m. He worked the entire period during the strike, as did the entire crew. There were a few pickets for only 15 minutes on the first day of the strike. He was told by management to work 12 hours at the yard and then take 12 hours off. During the time he was there, he was instructed to report to work at noon and work until midnight, and that he would receive 4 hours overtime each day. During the entire 11 days of the strike, he left the Palmdale Maintenance Yard only once, to go to Lancaster to do some maintenance work for approximately 4 hours. He testified that for the balance of the time, along with the other employees at the maintenance yard, all he did was sit around, talk, and watch television, and that all of the other employees did exactly the same thing. He did spend 3 or 4 hours at a time constructing a sheet metal building, but he testified that the construction of the 9 × 7 foot building had nothing to do with the strike. Further, he and other employees barbecued, brought their girlfriends and families to the barbecues, and generaly had a social time.

Hawkins, the supervisor who told Christopherson to remain 12 hours, credited himself with 60 hours of over-

time. (Exh. 194.) Ferguson, another management employee, told Christopherson that if there was no work to do, he should "just hang loose". Ferguson credited himself with 60 hours of overtime.

The Union submitted Exhibit 352 for the Compton Maintenance Yard, where there are normally 60 blue collar employees. Three employees went out for two days, three employees for one day, and one employee for four days. Although there was almost a complete crew working at Compton during the strike, the District credited 3,723 hours of overtime at the Compton location.

The District paid each employee an additional $5.00 a day for a meal allowance, as they were assigned to be at the yards for 12 hours. The Trial Court allowed the $5.00 meal allowance, as it did the time and one half for the extra 4 hours. If the extra 4 hours per day was unnecessary and was unreasonable, then the $5.00 meal allowance should also be disallowed.

2. The South Gate Transfer Station.

Van Huit, the management person responsible for the South Gate Transfer Station, testified that the transfer station was closed down completely. Exhibit 343 shows that only a few of the blue collar employees normally assigned to South Gate went on strike. However, even though the South Gate Transfer Station was closed, the District assigned a number of construction employees to do work unrelated to the strike. The District paid, and the Trial Court granted, 128 hours of overtime for the work at the South Gate Transfer Station. In the initial claim during the trial, the District claimed overtime for Brian Stirrat on the basis of 65 hours of overtime. (Exh. 138.) However, the evidence established that Stirrat was assigned to oversee the construction project which had been planned long before the strike. The District then excluded

Stirrat's amount from the claim. However, the District claimed overtime paid to Jay Flake, who was paid for 41 hours, and A. Guerrero, for 52 hours of overtime (Exh. 194), although the testimony was uncontradicted that these two employees were given a special assignment of driving a truck and delivering materials to San Francisco on a research project that had nothing to do with the strike. (Rep. Tr. Vol. 2, p. 399.) The Trial Court gave full credit for this overtime.

D. The Trial Court Committed Prejudicial Error in Awarding Overtime as Damages at the Upstream and Desert Treatment Plants.

The Lancaster, Pomona, Valencia, Saugus, Whittier Narrows, Los Coyotes, Palmdale and La Canada plants operated on the same system and schedule.[20]

The upstream plants operate on an eight hour shift, 7:00 a.m. to 3:30 p.m. seven days a week, with a crew varying from two to four treatment plant operators. There are usually one or two lab employees also assigned to the treatment plants. All of the personnel leave at 3:30 p.m. each day. Each plant is surrounded by a six foot gate with a padlock. After 3:30 p.m., the plants are on an ADT alarm system. (Rep. Tr. Vol. 2, pp. 915-923; Vol. 3, pp. 716-724; Vol. 4, pp. 840-847, 874-879.)

During the strike, Beeken assigned the non-striking blue collar employees to work 12 hours a day, with four hours overtime.[21] He also assigned two or more manage-

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[20]La Canada was in a different situation, as no employees were normally assigned to La Canada. One person would check La Canada for two or three hours per day, and there was a regular inspection by Cochran as the supervisor.

[21]Virtually all of the blue collar employees worked at the upstream plants during the strike.

ment personnel to each of the upstream plants on a 24 hour basis. The blue collar employees received a $5.00 meal allowance on the 12 hour shift. The management employees were given $11.00 per day based on the District's policy on per diem expenses. Cots were brought into the plants, and the management personnel slept at each of the plants. However, no meals were brought in, and they went out three times a day by driving to a restaurant, eating their meals, and returning to the plant. There was virtually no picketing at any of the plants except possibly for the first 15 minutes on the first day of the strike. The management people came and went whenever they wished to do so, and, in fact, they did leave at least three times a day in order to obtain their meals. There were few strikers and no problems during the strike; nor was there any emergency, and the plants operated in a normal manner. (Rep. Tr. Vol. 3, pp. 670-678; Vol. 4, pp. 916-929.)

Beeken testified that he did not visit the upstream plants during the strike, and therefore he could not testify as to what work was needed or performed at such locations. He merely stated a conclusion that because of the strike, he assigned management people to remain at the plants on a 24 hour basis for security reasons as well as to be present in case any problems developed.[22]

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[22]There was an inference by Beeken that the management persons were assigned on a 24 hour basis in case the blue collar employees who did not strike decided to leave their work during the course of the strike. Such an argument is without merit, as it cannot be assumed that an employee who decided not to go on strike would then, during the course of the strike, leave his work. Further, there is no evidence of this occurring; in fact, no employee who decided to work failed to show up during the strike. Also, on a normal schedule, there were no employees assigned after 3:30 p.m.

As to security, there is no explanation as to why the District did not simply hire one guard for each plant, as they did hire guards at the landfills and at the JWPCP. Further, the plants are in self-enclosed areas surrounded by padlocked six foot fences. Further, it is difficult to justify that there were legitimate security concerns when the management people slept, barbecued and entertained their girlfriends and families at the plants.

Regarding any possible breakdown of the equipment, the plants were on the ADT system as they had been for many years, and there was no reason why, if a problem developed, supervisory and management people would not be available. For example, Horace Cochran, a supervisor who was available, was never called during the strike. (Rep. Tr. Vol. 3, pp. 647-658.)

Cochran testified that he had been working for the District for over 26 years. In 1976 he was a supervisor of operations for the plants at Saugus, Valencia and La Canada. His normal duties were to visit all three plants, give assignments and check the work. He said that normally he puts in 10 to 12 hours per day, but has never claimed overtime pay. During the strike, he continued to work and performed his normal duties, working 10 to 12 hours per day, and he did not claim any overtime pay.[23] Cochran testified that after 3:30 p.m., there are no employees assigned to the plant and the plant is on a ADT system, and that he, himself, as a supervisor, would be called from time to time. He said that during the strike, he made daily trips to each of the three plants; that none of the treatment plant operators went out on strike at

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[23]Cochran's approach to his work and his responsibilities as a supervisor must be contrasted to the other management employees who, when given carte blanche, went into a virtual orgy of overtime and received huge amounts of money for the 11 day period, with the complete blessings of the District manager, Parkhurst.

Saugus; also, that the lab technicians worked during the strike; that maintenance was done in a normal manner; and that there was no difficulty in getting maintenance people to respond. He testified that treatment plant operators were given assignments to work longer than their regular shift, and as a supervisor, he did not know of any need for personnel to be assigned after 3:30 p.m. He visited Saugus, Valencia and La Canada, and there was never any trouble on coming and going.

He testified that he saw some management persons at the plant and he did not know what work there was for them to do. He did not observe any of the management people doing any work that was necessary, as the plants were fully manned by the regular blue collar employees. (Rep. Tr. Vol. 3, pp. 638-662.)

Gilbert Lechuga testified that he was assigned to the Palmdale plant prior to the strike. He normally worked eight hours a day, from 7:00 a.m. to 3:30 p.m. On a normal assignment, there were two treatment plant operators working with C. B. Price as the supervisor. On a special need, he was called possibly once or twice a month by the ADT alarm system. Normally, when one treatment plant operator was on vacation, the other treatment plant operator did the work by himself to cover the shift, along with the supervisor.

Lechuga, as a member of the Union, attended the Union meeting on July 1, 1976, but voted not to strike and did not participate in the strike. He reported to work and was assigned to work 12 hours, seven days a week. He observed one picket for 15 or 20 minutes the first day of the strike, and did not see any pickets for the balance of the strike.

During the strike, Lechuga testified that a management employee, Payne, was present 24 hours a day, and had a

cot, blankets and pillows. Lechuga said that during the strike he did his normal work, but did it in 12 instead of 8 hours; and that he could have done his work during his normal 8 hour shift.

He testified that Payne did not know anything about the plant and that during the entire period, Payne was reading books and would take walks around the plant. Payne also would talk to him at length about baseball and football. On one occasion, Payne attended a barbecue with the maintenance crew, accompanied by his girlfriend and her daughter. (Rep. Tr. Vol. 3, pp. 716-736.) See also the testimony of Mark Christopherson as to the non-work activities at Palmdale during the strike. (Rep. Tr. Vol. 3, pp. 684-714.)

Western testified that he was a treatment plant operator at the Pomona plant. He worked normally on a rotating basis with the foreman and one other treatment plant operator. On many days, the plant was manned by one person.

Western was a member of the Union and attended the meeting on July 1, but voted not to strike and did not participate in the strike. On the first day of the strike, one treatment plant operator was off for one day and then returned to work. There were no pickets at any time during the strike at Pomona. He worked his normal schedule and the overtime, and performed his regular duties.

He testified that three professional employees, Dr. C. Chen, Joe Haworth, and Keith Lewinger, were at the Pomona plant, two at a time, on the basis of 24 hours a day. C. Chen was an engineer, and Haworth and Lewinger were public relations personnel. He said that they slept at the plant and spent most of their time reading and engaging in social conversation. There was no work for

them to perform as the plant was fully manned by the regular blue collar employees. (Rep. Tr. Vol. 4, pp. 840-855.)

For sleeping, eating, reading, and social conversations, Chen received 145 hours of overtime and was paid $3,139.25; Haworth received 105 hours and was paid $2,294.90; and Lewinger received 126 hours and was paid $1,934.10. (Exh. 194.)

At the Valencia plant (Exh. 333), management employees accumulated 376½ hours.

At Palmdale, Payne read books, walked, and brought his girlfriend to the barbecue, and was given 81½ hours of overtime. (Exh. 194.) At Palmdale, there were two employees normally assigned, and none went on strike. (Exh. 334.) At Lancaster, there were two blue collar employees normally assigned, and none went on strike. However, the District allowed 477½ hours of overtime. (Exh. 335.)

At Saugus, there were four blue collar employees normally assigned, and none of the treatment plant operators went out on strike. However, at that facility, 777½ hours of overtime was credited. (Exh. 336.)

Exhibits 333-340 show the amount of overtime paid at the upstream and desert plants. There is no factual dispute that the District paid such amounts for management employees to sleep, read books, watch television, walk around, engage in conversations, attend barbecues with girlfriends, and to drive in and out of the plant three times a day and enjoy meals at a restaurant. The Trial Court allowed the full amount of time and one half to be included as damages.

Exhibit 368 sets forth the amount of savings, based on time and one half for overtime, if the District had followed reasonable assignments at the upstream plants.

There were very few employees on strike; there was virtually no picketing; and work was normal in every respect. The plants were on an alarm system after 3:30 p.m., and were enclosed by a six-foot gate which was padlocked. Any need for security could have been covered by one guard, and any problems during the course of the hours after 3:30 p.m. would have been handled through the alarm system. There was no work or need for extra persons to be assigned to sleep at the upstream plants. Instead, the District accumulated $87,269.66 of overtime expense at the upstream plants. The Union contends that this amount is unreasonable and should have been disallowed by the Trial Court. There was some overtime expense that was proper, such as for employees working on a sixth or seventh day (Saturday and Sunday), and for this amount of overtime the District would have incurred a cost of $7,687.34.

In the event such overtime is not completely disallowed, then at the most the District was justified in assigning the employees on a 12 hour day (which in fact it did for the blue collar employees who did not engage in the strike). The management employees could have been assigned to 12 hour shifts, and for the other 12 hours, they could have gone home, slept, and had their meals. There was no reasonable basis for the District to pay such persons for sleeping, reading, and not performing any work. Therefore, at a minimum, the amount of $56,388.02 must be deducted from the overtime claim (based on a 12 hour a day assignment). Exhibit 368 shows overtime on alternative reasonable assignments rather than 24 hours a day.

	Savings based on time and one-half overtime
10 hours a day assignment	$67,853.43
12 hours a day assignment	$56,388.02
14 hours a day assignment	$45,792.89

On the amount of overtime pay that should properly have been paid under the Salary Resolution, the amounts are less. (Exh. 369.) The total amount of the Salary Resolution expense at the upstream plants was $65,807.24. Again, only allowing for proper overtime on Saturday and Sunday, the amount of overtime should be disallowed by the amount of $60,259.72. However, the management employees should have been assigned at the most to a 12 hour day, allowing them to go home and sleep, have their meals and then return. On this basis, the District would have avoided paying $43,470.69.

The Union contends that at most, a 12 hour day would have been reasonable, but even giving the extreme benefit of the doubt to the District, it would be entirely without reason to pay overtime beyond a 14 hour day.

	Savings based on Salary Resolution
10 hours a day assignment	$51,753.87
12 hours a day assignment	$43,470.69
14 hours a day assignment	$35,897.90

In addition, at the upstream plants, since operations were almost completely normal, there was no justification to assign management employees to sleep on the premises and accumulate overtime on Saturday, July 17 and Sunday, July 18. The employees voted on July 16 to terminate the strike. Roberts called Thompson on July 16 and told him that the strike was over, and that the employees who were normally assigned to work on Saturday, July 17,

would report to work. (Rep. Tr. Vol. 3, pp. 595-606.) Even assuming there were problems in contacting the strikers, it made no practical difference at the upstream plants, since all of the employees were already working during the strike. Therefore, the District cannot justify overtime for Saturday and Sunday, July 17 and 18. The amount of overtime for the two days, based on time and one half, was $4,870.94, and based on the Salary Resolution, $3,337.62. (Exhs. 368 and 369.)

E. The Trial Court Allowed Excessive Overtime Damages at the Joint Water Pollution Control Plant (JWPCP), Long Beach and San Jose Plants.

The JWPCP and the two other plants with 24 hour operations present a different situation than the upstream and desert plants. At such plants, a substantial number of the blue collar employees did go out on strike.

The Union does not contend that the District did not have the right to assign management employees to operate JWPCP during the strike. The issue is whether it was reasonable to assign such personnel to remain on the premises 24 hours a day and to pay time and one half for sleeping, eating, reading, or in general, not performing any work.

Beeken gave, as the reasons for this unusual assignment, the security of the plant and the need to be available for work and any emergencies. For this reason, he allowed overtime for the employees when they slept, ate, played cards, and enjoyed other leisure activities. (Rep. Tr. Vol. 3, pp. 664-678.) Regarding security, it is difficult to understand how management personnel could further secure the plant, since the District expended over $10,000 for professional extra security at JWPCP. (Exh. 161.)

On the need to perform work, the evidence was that the plant operates on the basis of three rotating shifts of treatment plant operators, consisting of 12 to 15 per crew. On the day shift, there is an additional crew of 12 to 15 persons who fill in and engage in training and maintenance work. During the swing shift or second shift, there is one crew of 12 to 15 treatment plant operators and several custodians. There are no other employees at the plant during this second shift. The same situation exists on the third shift, except no custodian employees are present. The large support group, consisting of maintenance employees, including craftsmen such as plumbers and electricians, are all assigned to the day shift. (Rep. Tr. Vol. 3, pp. 783-796, 818-824; Vol. 4, pp. 956-958.)

Any problems regarding maintenance or malfunctions of equipment would have been handled by assigning or calling maintenance persons to JWPCP from the maintenance yards. In fact, all of the maintenance employees at the maintenance yards were sitting around barbecuing, watching TV and reading, and there was no reason why such persons could not have been assigned to JWPCP or at least have been on call.

The District did not have any supervisor or management person testify as to exactly what the management persons did at JWPCP during the 24 hours. The failure of the District to present any evidence as to what work was performed in the plant is a substantial failure to sustain their burden of proof for such excessive overtime damages at JWPCP.

On the second and third shifts (swing and graveyard), the District reasonably should have assigned 15 management persons that would have replaced the blue collar workers that were on strike. Instead, the District used 36 to 42 management persons during the second and third shifts. (Rep. Tr. Vol. 3, p. 676.)

There were no problems of coming and going, as Beeken testified that any person could leave JWPCP whenever he wanted to for personal reasons, and in fact many did leave and return. (Rep. Tr. Vol. 2, p. 344.) There was no record kept as to the hours the management people were gone, since the records show only 24 hours pay for each day of the strike.

The Union witnesses, who were long-time experienced treatment plant operators at JWPCP, Sullivan and City, testified that on the second and third shifts there was no work to be performed by anyone outside of the regular 12 to 15 treatment plant operating crew. (Rep. Tr. Vol. 3, pp. 786-796; Vol. 4, p. 956-958.) The adding of 15 to 20 management people to sit around and sleep provided no justifiable basis to pay them overtime. There simply was no work for them to perform.

There was no evidence of any unusual or abnormal conditions at JWPCP during the strike. The only evidence presented was that some debris was found on July 6 and again on July 16. However, City, who has been working at JWPCP for 15 years as a senior treatment plant operator, testified that it was normal to have debris come through the system, and that it was to be expected on a regular operating basis. There was no emergency if debris did come through, as most of the time it was cleaned up by the treatment plant operator crew, and if there was any substantial or heavy debris, then a crane operator would be called in to assist in removing the debris. He testified that a number of things come through the plant, such as rolls of wire, tires, etc., and that it was the responsibility of the treatment plant operators to remove the debris. (Rep. Tr. Vol. 3, pp. 955-958.)

The Union does not question that the District could have reasonably assigned management persons to work longer than eight hours at JWPCP. However, the Union

submits that a 24 hour pay period was not reasonable or justified. A reasonable basis on which to fully operate the plant was on 12 hour shift assignments. On this schedule, the management persons would have worked 12 hours, and for the other 12 hours they could have gone home. The District at JWPCP paid overtime at time and one-half in the amount of $129,824.26. (Exh. 367.)

The Union submits that 12 hours a day was more than reasonable. However, assuming that under extraordinary circumstances an employee could and did work 14 hours a day for 11 days, then the District acted unreasonably in not assigning the management employees to a 14 hour day.

Exhibits 366, 367, 368 and 369 set forth the amount of overtime that the Trial Court should have considered as reasonable, not the 24 hours that it allowed as damages. For example, the savings at JWPCP would have been as follows (Exhs. 366 and 367):

Savings at:	1½ time	Salary Resolution
12 hours a day assignment	$87,145.03	$61,545.42
14 hours a day assignment	$72,645.74	$51,547.81

Since the strike ended on July 16, and even conceding there were problems of communications and the District did not know how many employees would return to work on Saturday, July 17, there was no basis for accumulating additional overtime on July 17. The testimony is clear that as of the evening of July 17, employees who were on strike had been notified, and those who were on the July 17 Saturday night shift did report to work. There was no reason to keep management employees at the plant for 24 hours on July 17. The savings on the overtime, based on time and one half, for Saturday, July 17 are $6,777.74, and on the Salary Resolution are $4,797.99.

There does not appear to be any authority in California on this unusual claim of the District that it can collect damages on payments to high-salaried management employees for sleeping, eating, playing cards, etc.

Witkin, *Torts,* Vol. 4, Section 870, at page 3158 — duty to use reasonable care and minimize the loss. *Valencia v. Shell Oil Co.,* 23 Cal.2d 840 (1944) — person bound to exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts. See also *Steelduct v. Henger-Seltzer Co.,* 26 Cal.2d 634 (1945); *Kleinclaus v. Marin Realty,* 94 Cal.App.2d 733 (1949); *Sheffet v. Los Angeles County,* 3 Cal.App.3d 720 (1970).

In *A. A. Baxter Corp. v. Colt Industries, Inc.,* 10 Cal.App.3d 144 (1970), the Court of Appeal disapproved of a rate schedule "arbitrarily selected by plaintiff as the measure of its damages" (*id.,* at 155) and improperly used by the trial court as a measure of damages. The Court of Appeals, in reversing the Trial Court on damages, held at page 60:

> "Where there is more than one method of ascertaining damages, that method which is most definite and certain should be adopted. No one method is exclusive, where several exist, but that one should be chosen which best achieves the fundamental purpose of compensation to the injured person for his loss; and if the facts show that either of two measures of damages will fully compensate plaintiff for his loss, *that measure must be adopted which is less expensive to defendant."* (Emphasis added.)

The Court cited *Rivolich v. Raymond,* 20 Cal.App.2d 630, 644, and *Colvin v. John Powell and Co.,* 163 Neb. 122 [77 N.W.2d 900]; 25 C.J.S. Section 72, p. 842. The Court

refers to the "fully compensated" plaintiff. In this case, the District was compensated for damages which were not caused by the Union, damages which the District unlawfully helped itself to on the expectation that that Union could pay for this "windfall".

* * *

If the figure used by the trial court in determining damages cannot be supported under any reasonable interpretation of the record, a reviewing court may reverse or remand. See Cal.Jur.2d Damages Section 148, p. 290; *Benson Electric Co. v. Hale Bros. Assoc., Inc.,* 246 Cal.App.2d 686 (1966); and *Kitchel v. Acree,* 216 Cal.App.2d 119 (1963) (where the Court of Appeal remanded two items of damages to the trial court).

F. The Trial Court Was in Error in Granting Damages for All Overtime at the Landfills.

The Union does not contend that at some landfills it was unreasonable for the District to have non-striking blue collar employees or management employees report early and stay some extra time after closing. However, the District allocated overtime not based on one-half hour before the landfills normally opened, but assigned people to come in at least two hours before the landfills opened. Exhibits 194 and 196 do not specify the amount of overtime pay allocated to the landfills. The Union introduced evidence as to the amount of normal staffing and the unreasonable overtime paid at the landfills during the strike. (Exhs. 344, 345, 346, 347, 348, and 349.) At Calabasas, there were nine blue collar employees normally assigned to that landfill. McCool was on strike for several days, returned to work, and then went to Barstow to attend car races, and returned to work the following Monday. (Rep. Tr. Vol. 3, pp. 740-757.) A few of the other blue collar employees were off for one day, but by the

second or third day of the strike all of such employees were back to work. However, the District accumulated 365 hours of overtime at the Calabasas landfill, where conditions were almost completely normal. (Exh. 344.)

Johnson complained to McCool on numerous occasions that as a supervisor, he always reported to work at 7:30 a.m. and did not leave until after 5:00 p.m., but yet was not paid overtime. However, during the strike, when he worked almost the same hours that he worked normally, he was credited with 53½ hours of overtime. (Exh. 194.)

McCool, who was at the races in Barstow, was given 19 hours of overtime credit for such days. (Rep. Tr. Vol. 3, pp. 740-757; Exh. 194.)

Bonnell regularly lived at the Puente landfill and was normally there 24 hours of the day; he had never received overtime, but was given 78 hours of overtime during the strike. (Rep. Tr. Vol. 4, pp. 974-979; Exh. 194.)

Sharp lived in a trailer at Scholl Canyon landfill on a 24 hour basis, and did not receive overtime either before or after the strike. Sharp was assigned on a regular basis to live at the landfill on a 24-hour basis to act as a "watchdog." During the strike, Sharp received 72½ hours of overtime. (Rep. Tr. Vol. 4, pp. 993-996; Exh. 194.)

G. The Trial Court Was in Error in Allowing the Overtime at Laboratories and Offices of the District Where No Strike Was in Effect.

There was no evidence as to why any laboratory or clerical employees were entitled to overtime. The overtime at the laboratories, where no strike existed and no striking employees were involved, should not have been allowed by the Trial Court at $6,309.97 for time and one half, or $4,252.24 under the Salary Resolution. (Exhs. 139, 194 and 196.)

There was no evidence why clerical employees should have received overtime. Wahle was the executive in charge of payroll, worked in the office, and gave himself 36 hours of overtime at time and one half. Hall, who was the secretary to Thompson and took notes during the negotiations, was given 25 hours of overtime. Since there were no negotiations during the strike, there is a total lack of evidence as to what work she performed and why the Trial Court allowed her overtime as part of the damage award.

H. The Trial Court Was in Error in Allowing All the Items Claimed by the District as Strike-Related Without Requiring Proof of Reasonableness or Necessity.

The District introduced numerous bills and vouchers as "strike-related" expenses. (Exhs. 160 and 180). However, no evidence was presented on many of the items as to the causation between the strike and the expenses. Further, many of the following expenses were not reasonable or justified, but were still allowed by the Trial Court.

1. Meals at JWPCP.

The District catered meals to the employees who were on the premises 24 hours a day for 11 days. Such meal allowances were unnecessary, as based on a 12 or 14 hour day assignment, the employees could have gone home to eat at least one or two meals a day. However, even if such meals were proper, the District had a policy of paying management employees $11.00 per diem. At $11.00 per day, the cost of meals for the management employees at JWPCP, which is based on 40 persons for 11 days, would have amounted to $5,280.00. The District catered meals at a cost to the District of $9,105.00. Therefore, the difference of $3,825.00 should have been disallowed by the Trial Court.

2. Meals at the Joint Administrative Offices.

Exhibits 164-167 constituted the meal expenses at the Joint Administrative Office in the amount of $3,707.00. There was no evidence as to why any employees working in the administrative office, who were not on strike, were required to work overtime or if they did work overtime, and if so, for how many hours. Normally, the District does not provide meals to such employees. In view of the failure to produce evidence of reasonableness, justification or need, such meal payments should have been disallowed by the Trial Court.

I. The Trial Court Committed Error in Granting Pre-Judgment Interest.

The Trial Court awarded pre-judgment interest dated back to July 18, 1976.

The Union filed Objections to the Proposed Findings of Fact and Conclusions of Law as to the granting of pre-judgment interest in the amount of $87,615.22. The Objections were denied by the Trial Court. (Cl. Tr. p. 451.)

In order to be entitled to pre-judgment interest, the amount of damages must be certain or capable of being made certain by calculations, and must be subject to readily available standards such as market values. *Block v. Laboratory Procedures,* 8 Cal.App.3d 1042 (1970).

Pre-judgment interest is not allowable where the amount of damages is in dispute and depends upon a judicial determination based upon conflicting evidence without being ascertainable from the established market places or values. *Lineman v. Schmid,* 32 Cal.2d 204 (1948); *Leaf v. Phil Rauch, Inc.,* 47 Cal.App.3d 371 (1971).

In *Elliano v. Assurance Company of America,* 45 Cal.App.3d 170 (1975), pre-judgment interest was denied in an award for the market value of a damaged structure. The Court held that there was a dispute as to the measure of damages. The plaintiff and the defendant had each urged a different value and standard as to the amount of damages. The Court held that the amount depended upon the judicial determination, which was not ascertainable without a trial, and therefore pre-judgment interest was denied.

The law in California is that pre-judgment interest will be denied where there is a dispute as to the actual amount owed as well as to the liability. If the amount that is subject to damages is uncertain or cannot be determined by reference to well-established market values, pre-judgment interest will be denied. *Lineman v. Schmid, supra; Block v. Laboratory Procedures, supra;* and *Macumber v. State of California,* 250 Cal.App.2d 391 (1967).

Further, the law in California is that even where the amount of damages is of a nature that is certain or capable of being certain by calculation, there is still an obligation by the plaintiff to make the exact sum due to the defendant in order to justify pre-judgment interest. *Conderback, Inc. v. Standard Oil Company,* 239 Cal.App.2d 654 (1966). If a defendant does not know or cannot readily ascertain damages where they are uncertain, it is incumbent on the plaintiff to provide the defendant with a statement and supporting data from which the defendant could have made the necessary determinations. See *Conderback, supra,* at page 690. If a defendant does not know what amount was owed and could not ascertain it except by stipulation or by the judicial process, then the defendant is not liable for pre-judgment interest. *Levy-Zemper Company v. Southern Pacific Transportation Company,* 74 Cal.App.3d 762 (1977).

Where a party that may be liable for damages does not know what sum is owed and where damages can be arrived at only by a judicial determination based on conflicting evidence, then the damages are uncertain and there is no basis for an award for pre-judgment interest. See *Block, supra,* at pages 1046-1047.

There has been some confusion in California regarding pre-judgment interest under Civil Code Sections 3287 and 3288. Some courts have held that Section 3287 applies to contract actions, and that Section 3288 applies to tort actions or actions involving fraud, malice, etc. However, under Section 3287(a), where under appropriate circumstances, tort claims may provide the basis for pre-judgment interest, there still is a requirement of certainty. See *Levy-Zemper, supra.* The law is clear that under Sections 3287 and 3288, a plaintiff cannot recover pre-judgment interest as damages unless they are "certain or capable of being certain by calculation". In *Esgro Central, Inc. v. General Insurance Company of America,* 20 Cal.App.3d 1054 (1971), the Court stated that Section 3287(a) applies to situations:

> "where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where the dispute centers on the issue of liability giving rise to the damage."

The Court held that until the verdict and the damage trial was held, there was considerable "dispute between the parties concerning the basis of computation of damages". See page 1063.

In this case, the Trial Court did not specify whether it was awarding pre-judgment interest under Section 3287(a) or (b), or Section 3288.

The California Supreme has reviewed the law on pre-judgment interest in *Bullis v. Security Pacific National Bank,* 21 Cal.3d 801 (1978) and *Greater Westchester Homeowners Association v. City of Los Angeles,* 26 Cal.3d 86 (1979). In *Greater Westchester,* the Supreme Court held that pre-judgment interest on damages for mental and emotional injury and a nuisance action was improper. In denying pre-judgment interest, the Supreme Court explained *Bullis* and provided a test for determining whether pre-judgment interest is recoverable under Section 3288 on the basis that there must be certainty or that the damages were capable of being made certain by calculation.

Although in a limited type of tort action pre-judgment interest is allowed, there are still the basic requirements that the amount of damages must be certain or capable of calculation and not the subject of litigation between the parties. *Levy-Zemper,* applying such a basic rule of certainty or capability of being certain and not subject to judicial determination, is still the applicable law in California on pre-judgment interest.

In *E. L. White, Inc. v. City of Huntington Beach,* 138 Cal.App.3d 366 (1982), the Court cited *Levy-Zemper* as being the applicable law in California.

In *Southern Pacific Transportation Company v. State of California,* 115 Cal.App.3d 116 (1981), the Court held that an award of pre-judgment interest was invalid in a tort action as there was no finding of oppression, malice or fraud under Section 3288. A petition for hearing was denied on March 25, 1981. The Trial Court in this case made no finding of oppression, malice or fraud.

The trial established that there was substantial dispute as to the amount of damages. Further, the following items

show that not even the District knew the amount it was claiming until the end of the trial.

1. The Complaint for Damages was filed on July 6, 1976 and alleged compensatory damages in the amount of $27,000.00 a day for each day of the strike, and alleged that the amount of damages was not ascertainable at that time and that there would be further damages established by proof at trial. (Cl. Tr. pp. 1, 32.)

2. There was no demand or notice given to the Union regarding the amount of damages claimed until the filing of the Amended Complaint on June 12, 1979. (Cl. Tr. p. 147.) The Amended Complaint, in the Second Cause of Action, alleged total expenditures due to the strike over normal expenditures in the amount of $430,841.40. This amount was then broken into three separate divisions, consisting of: (a) paid overtime in the amount of $363,796.35; (b) compensatory overtime, $18,046.64; and (c) related costs in the amount of $48,999.41. The Amended Complaint also prayed for punitive damages in the amount of $4,000,000.00.

3. The District's Pre-Trial Brief stated that the District was prepared to present evidence as to compensatory damages in excess of $400,000.00, and further that there should be no offset from the damages on salaries saved that were not paid to the strikers, and that the burden of proof was on the Defendants regarding any offset on the salaries of strikers. (Cl. Tr. pp. 274, 305.)

4. During the trial, the District introduced Exhibit 203 as to itemization of damages, requesting damages in the amount of $388,704.00.

5. The amount of compensatory time off claimed by the District varied even during the trial. In Exhibit 203, the District claimed compensatory time off damages in the

amount of $16,040.00, whereas in Exhibit 364, the District claimed $15,615.40.

6. On overtime paid at time and one half, the District, in Exhibit 194, claimed a total expense in the amount of $331,386.00 and compensatory hours in the amount of $16,040.00.

7. The District disputed that there was any offset on overtime saved that would have been paid to strikers (Exh. 363), which was allowed by the Trial Court.

8. The strikers' salaries that were withheld was a matter in dispute. In Exhibit 204, the District showed the amount of salaries withheld as $112,649.00, whereas in Exhibit 306, it showed the amount of $118,793.46. The Trial Court allowed an offset in the amount of $112,649.00. (Cl. Tr. p. 426.)

9. The Union claimed as an offset the amount of retirement pay that would have been paid to strikers, which was disputed by the District. The Trial Court granted such offset in the amount of $8,312.00. (Cl. Tr. p. 426.)

10. The Union claimed as an offset the overtime saved in an amount of $8,992.00, which was disputed by the District and allowed by the Trial Court. (Cl. Tr. p. 426.)

11. The District, during the course of the trial, claimed additional damages as lost productive time in the amount of $32,341.04. (Exhibit 197.) The Trial Court excluded the exhibit as an item of damages. The District persisted throughout the trial in attempting to claim the additional damages of $32,341.04. (Rep. Tr. Vol. 3, p. 507.)

12. The District, during the course of the trial, reduced its claim for guard service since the original claim

included costs incurred after the strike had been terminated. (Exh. 180; Rep. Tr. Vol. 3, p. 487.)

13. The accountant for the District testified that the audit for the District on the amounts paid was not completed until a week before the trial. (Rep. Tr. Vol. 3, p. 487.)

14. The District made a motion to amend the Complaint to conform to Exhibit 203, to show the amount of damages claimed as well as the lost production time. The motion was granted to amend the Complaint to conform to Exhibit 203, and the Court denied the motion to allow damages on lost productive time. (Rep. Tr. Vol. 3, pp. 504-507.)

In addition to the above, which establishes clearly that there was no certainty as to damages and clearly no notice to the Union as to the amount of damages claimed to be certain or capable of being made certain by calculation, there are all of the items that are in dispute as set forth in this appeal.

The Union submits that under the applicable law in California, there was a substantial amount of uncertainty as to the amount of damages. which could only be resolved by a trier of fact and upon review for error by the Appellate Court. Further, the District itself did not know the amount of its claim, as it did not complete its audit until one week before the trial and in fact could not give the Union sufficient or reasonable notice as to the specific amount of damages claimed. In addition, the law is clear that since the Trial Court did not make a finding of malice, oppression or fraud, then pre-judgment interest in this tort action cannot be allowed. *Southern Pacific Transportation Company v. State of California, supra.*

V.

CONCLUSION.

For the reasons set forth in this Brief, the judgment should be vacated in its entirety.

In the event there is liability, the judgment should be reduced in amounts to allow only overtime under the Salary Resolution and to eliminate: (1) compensation time where no loss was shown; (2) unreasonable hours of overtime; (3) overtime where no work was performed due to the strike; and (4) unreasonable assignments of overtime beyond 12 or 14 hours a day. Specifically, the Appellants specified the proper summary of damages in their Post-Trial Brief. (Cl. Tr. pp. 421-424.) In the alternative, the case should be remanded to the Superior Court on damages in accordance with direction from this Court as to the proper amount of damages to be allowed.

Further, the award of pre-judgment interest should not be allowed.

DATED: March 28, 1983.

Respectfully submitted,

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Attorneys for Appellants.

APPENDIX B

APPENDIX B

2ND CIVIL NO.

66088

In the Court of Appeal

SECOND APPELLATE DISTRICT

State of California

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, a public agency,
Plaintiff and Respondent,

VS.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER, GARY SCHALANDER, BILLY MANNING,

Defendants and Appellants.

Appeal from the Superior Court of Los Angeles County.
Hon. Charles H. Older, Judge.

RESPONDENT'S BRIEF

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IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, a public agency,
Plaintiff and Respondent,

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER, GARY SCHALANDER, BILLY MANNING,
Defendants and Appellants.

RESPONDENT'S BRIEF

I.

PRELIMINARY STATEMENT.

Appellants Service Employees International Union, Local No. 660 ("Local 660"), Victor N. Hochee, Harry Gluck and Jack Roberts (jointly referred to hereinafter as "Appellants") appeal from a judgment entered in the Los Angeles County Superior Court in favor of Respondent County Sanitation District No. 2 of Los Angeles County. The judgment was predicated on a complaint for injunctive relief and damages filed on July 6, 1976 (and subsequently amended on June 12, 1979), in connection with Appellants' involvement in a labor strike against Respondent. (C.Tr. 1, 147)[1]

The strike, which was the subject of the complaint, began on July 5, 1976 and lasted until on or about July 16,

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[1]The Reporter's Transcript is hereinafter referred to as "(R.Tr. ____)." The Clerk's Transcript is referrred to as "(C.Tr. ____)." Trial Exhibits are referred to as "(Ex. ____)."

1976. On the same date the complaint was filed, a temporary restraining order was sought and obtained. Appellants' Brief at 1-2. Although the temporary restraining order prohibited Appellants from engaging in a strike, it was ignored. As a result of this failure to obey said order, Local 660 was adjudged guilty of contempt in October of 1976 and fined $1,500. Appellants' Brief at 1-2.

Inasmuch as the payment of the above-referenced fine did not in any manner serve to make Respondent whole for the harm suffered as a result of the strike, it proceeded with the prosecution of its action. On August 13, 1981, following a 12-day bench trial before the Honorable Charles H. Older, judgment was entered in the amount of $246,904.00, with interest thereon from July 18, 1976 in the sum of $87,615.22, and costs in the amount of $874.65. (C.Tr. 488)

II.

STATEMENT OF FACTS.

Los Angeles County Sanitation District No. 2 is one of 27 sanitation districts within Los Angeles County. Each such district is a separate and autonomous political subdivision of the State of California, authorized by *Health & Safety Code* § 6400 *et seq.* (West 1970 & Supp. 1983). (R.Tr. 11-13) Los Angeles County Sanitation District No. 2 is authorized by a joint powers agreement (Ex. 120; *see Gov't Code* § 6500 *et seq.* (West 1980 & Supp. 1983)), to act on behalf of itself and the 26 other districts, in numerous matters, including personnel and labor relations. (These 27 sanitation districts are hereinafter jointly referred to as "the District").

The District operates sanitary landfills for the disposal of rubbish, sewage treatment plants and approximately 11,000 miles of sewer trunk lines. (R.Tr. 11-12, 260) The landfills in use in 1976 included the Palos Verdes, Puente

Hills, Mission Canyon, Scholl Canyon, Spadra and Calabasas facilities, which together received about 15,000 tons of refuse each day. (R.Tr. 350) The 11 sewage treatment plants, which include the Long Beach, Los Coyotes, Whittier Narrows, San Jose Creek, Pomona, Saugus, Valencia, Palmdale, Lancaster and La Canada water renovation plants, were processing 450 million gallons of raw sewage each day. (R.Tr. 261; Ex. 102 through Ex. 119) Most of these plants are upstream "feeders" to the Joint Water Pollution Control Plant ("JWPCP") located in Carson.[2] (R.Tr. 261) In maintaining these operations, the District served approximately four million County residents. (R.Tr. 12)

The District's labor relations are governed by the Meyers-Milias-Brown Act, *Gov't Code* §§ 3500-3511 (West 1980 & Supp. 1983), and its Employee Relations Resolution (Ex. 122), as authorized under that Act. Local 660 is a labor organization affiliated with the Service Employees International Union, AFL-CIO, which has represented the District's blue-collar employees since 1973. At all times pertinent hereto Victor N. Hochee was the general manager of Local 660 (R.Tr. 23, 421), Harry Gluck was Local 660's manager of representational services (R.Tr. 618, 622), and Jack Roberts was one of its field business representatives. (R.Tr. 412)

The District and Local 660 have bargained concerning the wages, hours and working conditions of the District's blue-collar employees, under the Meyers-Milias-Brown Act, since 1973. (R.Tr. 24-25) Each year[3] these

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[2]The District maintained other facilities, such as maintenance yards in Palmdale, Compton and San Gabriel, the South Gate Transfer Station and 46 pumping stations, as well as a Joint Administrative Office ("JAO"). (R.Tr 260-62)

[3]Prior to 1977, MOUs were one year in duration.

negotiations resulted in a binding labor contract, or Memorandum of Understanding ("MOU"), *See Glendale City Employees Ass'n v. City of Glendale,* 15 Cal. 3d 328, 124 Cal. Rptr. 513, 540 P.2d 609 (1975), *cert. denied,* 424 U.S. 943 (1976).

Local 660 has struck in support of its collective bargaining demands on two occasions. In June 1974, Local 660 engaged in a five-day strike, supported by virtually all the District's blue-collar employees. (R.Tr. 711, 936) The District responded to the strike by filing a legal action not unlike that which is the basis of this proceeding and by obtaining a restraining order. (Los Angeles Superior Court Case No. C-92480) In spite of the existence of the restraining order, the strike continued for several days following its issuance. The matter, however, was not pursued in court in that the action was dismissed as part of a strike settlement. (R.Tr. 25, 570)

Local 660's second strike, the subject of this lawsuit, lasted from July 5 through July 16, 1976. (R.Tr. 419-20) Despite approximately 19 negotiation meetings over a 3½ month period prior to the strike, and the District's comprehensive, compromise proposals on June 23 and July 1, 1976, the parties were unable to reach agreement on the terms of a new MOU. (R.Tr. 29) On the evening of July 1, 1976, Local 660's membership rejected the District's last offer and voted to strike. (R.Tr. 590-95) The work stoppage did not begin, however, until 10:00 p.m., Monday, July 5, so employees could receive holiday pay for that day.[4]

It is clear that Local 660 prepared for the 1976 strike well in advance of July 5, 1976. Such preparations included the hiring of a media consultant; the purchase of

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[4]As July 4 fell on a Sunday in 1976, the following Monday was observed as a paid holiday. (R.Tr. 240, 967-68)

newspaper ads; the preparation, stockpiling and distribution of picket signs; the written request to the Service Employees International Union and the Los Angeles County Federation of Labor for strike sanctions; the printing of brochures; the renting and equipping of local strike headquarters; the appointment of picket "captains"; the preparation of "hot-line" telephone messages,[5] and other strike-related activities. (R.Tr. 35-36, 420, 423-26, 598, 617; Exs. 126, 184, 187, 191, 192; C.Tr. 138-40, 158, 209-14)

In order to keep critical facilities operating, the District also prepared for the strike prior to July 5, 1976. Roger Beeken, the engineer in charge of the District's sewerage department, prepared a written "strike-contingency" plan (Ex. 145) to insure continued operation of the sewerage treatment plants. This comprehensive plan provided for 24-hour assignment of the 42 available management personnel to specific locations and duties for the duration of the strike. (Ex. 145) It also set forth the overtime policy for the strike, provided for added security personnel and delineated arrangements for food and sleeping accommodations. (Ex. 145) The plan was specifically designed to rectify deficiencies in the District's response to the 1974 strike, in assuring tighter plant security and a more orderly transition to management operation. (R.Tr. 257-58; Ex. 145)

Similarly, in anticipation of the strike tentative arrangements were made to staff the landfills with available management and professional employees. (R.Tr. 355, 358, 972) Moreover, due to the fact that the District's landfills had been vandalized during the 1974 strike, arrangements

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[5]Local 660's "hot-line" consisted of pre-recorded telephone messages concerning the strike and negotiations. (*See* R.Tr. 420-21; Ex. 191; C.Tr. 167-72)

were made to upgrade security at the various sites. (R.Tr. 358, 367) In all respects, the District's primary objective was to maintain operations at the sewage treatment plants and landfills (R.Tr. 356)

The strikers' objective was precisely the opposite. Even before the strike began, employees attempted to sabotage vital equipment at the JWPCP, the District's main sewage treatment plant. Management personnel replacing blue-collar employees shortly after 10:00 p.m. on July 5, discovered a sewage discharge line blocked with a plywood disc. Plant vehicles, their keys hidden in the hubcaps, were found blocking the entrance to the standby generator building. (Ex. 157) The battery cables to the standby generator had been cut. (Exs. 157, 175, 176).

On July 6, 1976, management discovered a particularly dangerous condition in the large, sewage "digestion" tanks at the JWPCP. For two or three days prior to the strike, employees had deliberately overfed the anaerobic bacteria in these tanks with sewage. This overfeeding caused a serious decrease in bacterial production of methane gas, which is used to power effluent pumps and other critical equipment at the JWPCP. The effluent pumps are necessary to prevent inflowing sewage from flooding the JWPCP in a manner that would severely incapacitate and damage the plant. Had these sabotage attempts not been uncovered, a disruption in the primary source of power in combination with the incapacitation of standby generators could have crippled a facility whose operation is critical to the health and safety of the community. (R.Tr. 330-34; Ex. 157)

Efforts to shut down District facilities did not cease after the strike began, On July 6, 1976, approximately 75% of the District's 500 blue-collar employees failed to report to work. (R.Tr. 40, 157; C.Tr. 135) Moreover, on the morning of the 6th, picketing commenced at virtually

all the District's treatment plants, landfills and other facilities. (R.Tr. 383, 833, 948; C.Tr. 136, 158-59, 183, 221) The pickets distributed leaflets and attempted to dissuade customers from using District facilities. (Exs. 183, 185; C.Tr. 158-59, 162-66) Entrances to District work sites were routinely strewn with roofing nails and broken glass; fences, gates and vehicles were damaged. (R.Tr. 325-30; Ex. 157)

Further, significant amounts of debris[6] were introduced into the sewer system immediately upstream from the JWPCP. Unless such debris is quickly removed from the mechanical rakes and screens, which prevent such flotsam from entering the JWPCP, the effluent flow would be dammed, and the rakes damaged. (R.Tr. 262, 327-29) During the strike, this debris caused precisely such damage. *Id.*

Despite acts of sabotage and picket line problems, District operations were not significantly impaired and as it became apparent that the District would not capitulate to strike pressures, a few employees began drifting back to work.[7] During the second week of the strike, discussions resumed and by Friday, July 16, 1976, the parties reached a tentative agreement on a new MOU, the terms of which were the same as the District's July 1 offer. (*See* Exs. 182, 335; R.Tr. 629) On the evening of July 16, 1976, Local 660 held a meeting at which the membership voted to accept the District's offer. (R.Tr. 1059-60) There has

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[6]Items retrieved from the inflowing sewer system included a mattress, tires, a canvas tarpaulin, upholstered cushions, carpeting and cabinet doors. (R.Tr. 328-29; Ex. 157, 158, 159) Such articles do not normally come down the sewer system, and never in such quantity. (R.Tr. 329)

[7]Nevertheless, agents of Local 660 continued throughout the strike to urge non-striking employees to leave their jobs. (R.Tr. 860-62, 1055-56)

been no strike activity by the District's employees subsequent to July 1976. (R.Tr. 1012)

III.

ARGUMENT.

A. The Superior Court's Finding of Liability for Appellants' Strike Activity Must Be Affirmed.

Appellants challenge the Superior Court's award of damages, caused by Appellants' strike activity, on the basis that (1) strikes by public employees are not unlawful in California, and (2) damages may not be awarded against Appellants regardless of the legality of the strike activity. All of Appellants' various arguments in this regard are without merit.

1. Appellants' Strike Activity Was Illegal.

Every California court to address the issue has held that, in the absence of specific legislative authorization, a strike by public employees is illegal.[8] The decision in this

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[8] *See, e.g., International Brotherhood of Electrical Workers, Local Union 1245 v. City of Gridley,* 121 Cal. App. 3d 169, 175 Cal. Rptr. 274 (1981), hearing before the Supreme Court pending; *Stationary Engineers v. San Juan Water District,* 90 Cal. App. 3d 796, 801, 153 Cal. Rptr. 666 (1979); *Pasadena Unified School District v. Pasadena Federation of Teachers,* 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977); *City and County of San Francisco v. Evankovich,* 69 Cal. App. 3d 41, 137 Cal. Rptr. 883 (1977); *Los Angeles Unified School District v. United Teachers,* 24 Cal. App. 3d 142, 145, 100 Cal. Rptr. 806 (1972); *Service Employees' International Union, Local No. 22 v. Roseville Community Hospital,* 24 Cal. App. 3d 400, 408, 101 Cal. Rptr. 69 (1972); *Trustees of California State Colleges v. Local 1352, S.F. State Etc. Teachers,* 13 Cal. App. 3d 863, 867, 92 Cal. Rptr. 134 (1970); *City of San Diego v. American Federation of State Etc. Employees,* 8 Cal. App. 3d 308, 310, 87 Cal. Rptr. 258 (1970); *Almond v. County of Sacramento,* 276 Cal. App. 2d 32, 35, 80 Cal. Rptr. 518 (1969); *see also*

judicial district which clearly disposes of this issue is *Pasadena Unified School Dist. v. Pasadena Federation of Teachers, supra.* The *Pasadena* case involved a one-day work stoppage by public school teachers allegedly "advised and induced" by the defendant union, its president and others. The Superior Court sustained defendants' demurrer and dismissed the plaintiff school district's complaint for damages resulting from the strike. This Court reversed the Superior Court's dismissal and remanded the case for trial. Quoting extensively from *Los Angeles Unified School Dist. v. United Teachers, supra* at 146, and other cases, the Court held:

> "[W]e . . . 'can conceive of no benefit which would result from our reanalyses of the same issues which the . . . cited opinions have exhaustively treated, with extensive citation of authority.' We find these authorities persuasive that the strike by plaintiff's employees was unlawful."

72 Cal. App. 3d at 107. The several cases decided after *Pasadena,* cited above, have not changed the analysis or the rule. Public employee strikes are still illegal, in the absence of appropriate legislation.[9]

Appellants cite *San Diego Teachers' Association v. Superior Court,* 24 Cal. 3d 1, 154 Cal. Rptr. 893, 593 P.2d 838 (1979), for the proposition that the legality of public employee strikes is an unresolved issue in California.

Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, 54 Cal. 2d 684, 687, 8 Cal. Rptr. 1, 355 P.2d 785 (1960) (dictum).

[9]Labor relations of school districts are now covered by the Education Employment Relations Act ("EERA"). *Gov't Code § 3540 et seq.* (West 1980 & Supp. 1983). The strike in *Pasadena* occurred over two years prior to the effective date of EERA, July 1, 1976, so the statute relevant to the school district's labor relations was the Meyers-Milias-Brown Act, as is the case here.

Appellants' Brief at 5. A careful reading of the *San Diego Teachers* case reveals, however, that the Supreme Court's holding was that it had *no jurisdiction* to decide the legality of the strike in that case.

In *San Diego Teachers* the defendant labor union ("SDTA") engaged in strike activity against the San Diego Unified School District ("school district"). The school district sought and obtained a preliminary injunction. The Supreme Court held, however, that the superior court had no jurisdiction to issue the injunction, reasoning that the Public Employment Relations Board ("PERB") established under EERA had exclusive jurisdiction to decide in the first instance whether the SDTA's strike activities were unlawful under EERA, and whether PERB should seek injunctive relief in the superior court. *San Diego Teachers* expressly rejected the notion that PERB and the courts shared, in some instances, jurisdiction to pass on the legality of public employee strike activities under EERA. Thus, the Court's statement that "it is unnecessary here to resolve the question of the legality of public employee strikes," 24 Cal. 3d at 7, implies at most only that the courts have no power to decide strike legality issues under EERA.[10]

Accordingly, *San Diego Teachers* is perfectly consistent with the Supreme Court's statement in *Los Angeles Metro-*

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[10]For the same reason, the Supreme Court's recent decision in *El Rancho Unified School District v. National Education Ass'n,* L.A. 31581 (May 31, 1983), is completely inapposite here. There, the Court held that the courts have no jurisdiction to award damages for strike activity which is "arguably protected or prohibited" under EERA, since such activity, under *San Diego Teachers,* is within the exclusive jurisdiction of PERB. As noted, the Legislature has not created an independent agency to administer the Meyers-Milias-Brown Act. The trial court in this case, therefore, clearly had jurisdiction to award damages for Appellants' illegal conduct.

politan Transit Authority v. R.R. Trainmen, 54 Cal. 2d at 687, 8 Cal. Rptr. at 2, that "[i]n the absence of legislative authorization public employees in general do not have the right to strike." In *R.R. Trainmen,* the Supreme Court expressly held that the Legislature had given the right to strike to a particular class of public employees. Similarly, in *San Diego Teachers,* the Supreme Court held that the Legislature had committed the initial determination of strike legality under EERA to PERB. Neither case is authority for Appellants' contention that the right of public employees to strike, such as the District's employees who are not covered by EERA or by legislation giving them a right, is somehow undecided in this state. Moreover, even if *San Diego Teachers* stood for the proposition that the right of employees subject to the Meyers-Milias-Brown Act to strike is unresolved by the Supreme Court, it in no manner diminishes the dispositive, precedential authority of *Pasadena* in this district.

Appellants also argue that the Supreme Court's decision in *City and County of San Francisco v. Cooper,* 13 Cal. 3d 898, 120 Cal. Rptr. 707, 534 P.2d 403 (1975), leaves open the question of the legality of public employee strikes, and is inconsistent with awarding damages caused by a public employee strike.[11] The *Cooper* case was a suit by the City and County of San Francisco and the San Francisco Unified School District to compel the Controller of San Francisco to implement salary increases reflected in the city and county's salary standardization ordinance and the school district's salary schedule resolution. The Controller had refused to do so because of a prior taxpayer suit. In both lawsuits, the real party in interest, the taxpayer, argued that the salary standardization ordinance and the salary schedule resolution were

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[11]The latter aspect of Appellants' argument is discussed in Part III (A) (3) (a), *infra.*

invalid "because they were adopted 'as a result of' and 'under the coercion of,' an illegal public employee strike." 13 Cal. 3d at 905. The Supreme Court refused, however, to invalidate the two "legislative" actions (*i.e.*, the ordinance and resolution) on the basis that the judiciary had no authority to investigate the motive behind a legislative body's actions because of the principle of separation of powers. It was therefore unnecessary to rule on the unions' contention that the strike in *Cooper* had been legislatively authorized.

In any event, even had the *Cooper* Court expressly stated the legality of public sector strikes to be unresolved in the Supreme Court, it would be scant comfort to Appellants in the face of uniform Court of Appeal precedent holding strikes by public employees to be illegal.

Appellants also argue that public policy presently dictates the blanket legalization of all public employee strikes, whether or not the Legislature has spoken, invoking the spectre of labor unrest and the alleged unfairness of the prohibition of public sector strikes.

Contrary to Appellants' suggestion, labor peace is not served by granting public employees the unfettered right to strike. The 1974 strike was settled with an amnesty agreement dismissing all court proceedings. Nevertheless, despite that "peaceful" resolution, coerced through strike activity, Appellants struck *again* just two years later. Thus, it can hardly be said that the 1974 strike and its settlement produced any permanent labor peace.

Conversely, after 12 days, the 1976 strike was resolved through the execution of a successor MOU (Ex. 355), embodying the District's pre-strike offer, despite the fact that the District refused to agree to an amnesty dropping all legal and disciplinary actions. There has not been a

strike in the ensuing seven years, during which this litigation has been pending. (R.Tr. 1012) The position espoused by Appellants that litigation necessarily exacerbates public labor disputes, therefore finds no support in this record.

Nor is the illegality of sanitation worker strikes unfair. It is axiomatic that the intent of any economic strike is to pressure the employer by either inhibiting or stopping its ability to operate. If an employer can continue to operate during a strike, it has less economic incentive to come back to the bargaining table with a better offer. There is abundant evidence in the record before this Court that impairing or completely curtailing the District's ability to operate was precisely Appellants' objective. Indeed, the "hot-line" messages from Local 660 to its members throughout the strike emphasized the curtailment of District operations. (Ex. 191) Here, however, curtailment of operations does not merely result in the imposition of economic pressure. Rather it places at risk the health and safety of an entire community.

Unquestionably, Local 660 and striking employees knew of the health and ecological dangers a successful strike would cause. Had Appellants been successful in their express intent to shut down the District's facilities, over 4 billion gallons of raw sewage could have been discharged into the Pacific Ocean. The consequences of such an occurrence would be disastrous. The court in *State of California v. City and County of San Francisco,* 94 Cal. App. 3d 522, 156 Cal. Rptr. 542 (1979), a case involving a six-day sewage worker strike, detailed the incalculable harm the discharge of 426 million gallons of sewage (a mere one tenth of the amount involved here) into the ocean had caused:

> "[V]isible discharge of sewage solids, odors, discoloration and turbidity (milkiness) [was evident] at

all sites. Samples of water showed coliform (waste material from colon of warm-blooded animals) levels over the permitted limit. Aerial photographs showed black discharge, floating sheen and numbers of scavenger birds.

"Marine life was harmed because chronium exceeded toxic levels. Testimony in the court below indicated that the sewage would have caused varieties of harm to fish and benthic organisms (those living near the bottom of the sea) although specific injuries were unknown."

94 Cal. App. 3d at 526; *see also Caso v. District Council 37, American Federation etc. Municipal Employees,* 43 App. Div. 2d 159, 350 N.Y.S. 2d 173 (1973) (Sanitation strike resulted in discharge of one billion gallons of untreated sewage into East River). (*See, e.g.,* R.Tr. 330-34, 327, 358; Ex. 189, Ex. 183)

In short, Appellants' public policy argument reduces to the proposition that Local 660 and the employees it represents have a right to endanger the health of four million residents of Los Angeles County.

Moreover, even assuming that Appellants' conclusory statements concerning the policy justifications for allowing public employees the right to strike were colorable, Appellants are simply in the wrong forum. The delicate balances involved in labor relations regulation and the guarantees of employer and employee rights,[12] both in the public and private sectors, have always been established through legislation, such as the National Labor Relations Act ("NLRA"), as amended, 29 *U.S.C.* § 151 *et seq.* (1977), the Meyers-Milias-Brown Act, EERA and other

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[12]At common law, all strikes were illegal. *See, e.g., Walker v. Cronin,* 107 Mass. 555 (1871); *cf. Loewe v. Lawlor (Danbury Hatter's),* 208 U.S. 274 (1908).

legislative schemes. In these enactments, the Congress and the California Legislature have recognized the need for individualized treatment for particular industries. In the NLRA, for example, Congress fashioned special rules for the construction industry, the garment industry, 29 *U.S.C.* § 158(e) & (f), and the health care industry. 29 *U.S.C.* § 158(g). California has a different statutory scheme for the public school systems (EERA), than for institutions of higher education. *Gov't Code* § 3560 *et seq.* (West 1980 & Supp. 1983) (Higher Education Employer-Employee Relations Act) ("HEERA"). The Meyers-Milias-Brown Act, the relevant statute in this case, is in turn distinct from EERA and HEERA. Given the subtle, carefully-crafted legislative distinctions not only between public and private sector employees, but also among various classes of such employees,[13] Appellants' demand for a right to strike must be directed to the legislature. *See Stationary Engineers, Local No. 39 v. San Juan Suburban Water District, supra; Almond v. County of Sacramento, supra; Newmarker v. Regents of the University of California,* 160 Cal. App. 2d 640, 646, 325 P.2d 558 (1958). Even the court in *City of Fairmont v. Retail etc. Union,* 283 S.E. 2d 589 (W.Va. 1981), a case relied upon by Appellants, recognized:

> "[I]n most other states the legislature has made an effort to make some statutory accommodations to the labor relation problems that exist in the public sector. Indeed, it was the initial inability of the courts to judicially resolve [sic] the competing interests of

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[13]The basis for distinctions among classes of public employees is readily apparent. For example, the potential for immediate, devastating harm to public health and safety is obviously much less in a strike by public school teachers than it is in a strike by sanitation workers, police or firemen. Thus, the Legislature has enacted differing schemes for regulating the labor relations of these distinct classes.

> private employees and private employers that led to federal legislation in the labor law field. Most if not all commentators in the labor law area agree that the complex issues in this field are ill suited to any comprehensive judicial solution."

283 S.E. 2d at 595.

In sum, the Legislature is the appropriate forum in which the common law illegality of public employee strikes is to be weighed. Moreover, even were Appellants' arguments properly addressed to the courts, they are little more than an unsupported and conclusory recitation, at odds with the evidence in this case and inimical to the public health and safety.

2. Appellants' Contentions Concerning the District's Good Faith During Negotiations and an Alleged Constitutional Right to Strike Are Neither Legally Sufficient as Alleged, Nor Supported in the Record.

Appellants raise two other broad claims in an effort to legitimate their strike. First, they contend that their actions are justified by the District's alleged failure to bargain in good faith. Second, Appellants claim that depriving public employees of the right to strike denies them constitutional equal protection and freedom of assembly and speech guarantees. These claims are noteworthy only in the frequency and consistency with which the courts have rejected them.

With reference to the first of these arguments, the District notes that wholly apart from the fact that it bargained in good faith, courts have uniformly rejected the notion that a public agency's lack of good faith bargaining justifies illegal strike activity under the Meyers-Milias-Brown Act. In *Stationary Engineers Local No. 39 v. San Juan Suburban Water District, supra,* the lone case cited by Appellants, the court categorically stated:

> "[U]nder California law public employees have no right to strike whether their employer violates the Meyers-Milias-Brown Act or not."

90 Cal. App. 3d at 801 (citation omitted). The court noted that had the employees in that case had a legitimate grievance concerning the lack of good faith by the employing agency, their remedy was judicial. *See Placentia Fire Fighters, Local 2147 v. City of Placentia,* 57 Cal. App. 3d 9, 126 Cal. Rptr. 126 (1976). The court in *Stationary Engineers* discussed whether there was merit to the employees' allegations of lack of good faith bargaining, but contrary to Appellants' suggestion, there is no implication in the decision whatsoever that a lack of good faith by a public agency under the Meyers-Milias-Brown Act justifies or legitimates public employee strike activity.[14]

Moreover, the record in the instant case conclusively demonstrates the District's good faith bargaining. There is no evidence that the District ever failed or refused to "meet and confer in good faith regarding wages, hours, [or] other terms and conditions of employment." *Gov't Code* § 3505 (West 1980). There is no evidence that the District was not seriously trying to reach an agreement. The evidence affirmatively demonstrates that the District made economic concessions in its June 23 offer, which Local 660 rejected. (R.Tr. 163-66) On July 1, 1976, the District offered a package of economic and other conces-

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[14]For other cases rejecting such a justification for public employee strikes, *see Los Angeles Unified School Dist. v. United Teachers, supra; Trustees of Cal. State Colleges v. Local 1352, S. F. State etc. Teachers, supra; City of San Diego v. American Federation of State etc. Employees, supra; Almond v. County of Sacramento, supra; see generally, City and County of San Francisco v. Evankovich, supra,* 69 Cal. App. 3d at 47-48, and cases cited there; *Gov't Code* § 3509 (West 1980).

sions beyond those of June 23. (R.Tr. 246-47) Local 660 in turn rejected the terms of this July 1 offer.[15]

Appellants spent a great deal of time and effort at trial attempting to prove that the District's bargaining proposals would have resulted in a net decrease in pay for some employees.[16] Yet, even if this had been shown, it would not establish bad faith. In *Placentia Fire Fighters, Local 2147 v. City of Placentia, supra,* for example, the plaintiff labor union sought to show the defendant city's bad faith based, *inter alia,* on its proposed reduction of hours from 67 to 40 per week and elimination of certain fringe benefits. The court rejected this argument, reasoning that the Meyers-Milias-Brown Act contains "the right to remain firm." 57 Cal. App. 3d at 22. Appellants' apparent contention that proposing a pay cut is *per se* in bad faith under the Meyers-Milias-Brown Act is, therefore, frivolous.

Appellants' explicit contention that conditioning the July 1 offer upon recommendation of acceptance by Local 660's negotiating committee constituted bad faith bargaining is nothing more than a conclusory, unsupported statement. Appellants cite no authority, nor is there any, for the novel proposition that this condition constituted a failure to meet and confer in good faith under the Meyers-Milias-Brown Act. In short, the record clearly demonstrates the District's good faith, even were such relevant. *See generally NLRB v. General Electric Co.,* 418 F.2d 736 (2d Cir. 1969), *cert. denied,* 397 U.S. 965 (1970).

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[15]Indeed, because Local 660's negotiating committee refused to recommend acceptance of the July 1 offer, the offer which Local 660 ultimately accepted on July 16, it was not even *presented* to the membership of Local 660 prior to the strike. (R.Tr. 169-73, 593, 625-26)

[16]The record is clear that neither the District's June 23 offer nor its July 1 offer would have resulted in a pay cut. (R.Tr. 148-49, 240-42, 619, 628-29, 1049; *see* Ex. 182, Ex. 355)

Appellants also contend that the purported right peacefully to withdraw services from a public sector employer is of constitutional dimensions, apparently predicated on freedom of speech.[17] They further argue that "since private sector employees have the right to strike," Appellants' Brief at 9, the prohibition against public employee strikes contravenes constitutional equal protection guarantees. California courts have rejected both these contentions on numerous occasions.

In the *Pasadena* case, the Court, after extensive discussion of the relevant case law, concluded:

> "The foregoing authorities support the constitutionality of even prior restraint upon speech advocating an illegal strike by public employees. If such prior restraint is permissible, a fortiori the restraining effect of subsequent liability for damages which plaintiff here seeks to impose does not violate defendants' free speech rights."

72 Cal. App. 3d at 110; *see also, City and County of San Francisco v. Evankovich, supra; Los Angeles Unified School District v. United Teachers, supra.*

Regarding Appellants' equal protection argument, the court in *City of San Diego v. American Federation of State etc. Employees Local No. 127, supra,* after assuming that the right to strike was a "fundamental interest" under traditional equal protection analysis, unequivocally rejected that argument. The court noted:

> "[The Union] argues the rule of law denying a gardener on a public golf course the right to strike

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[17]Appellants also refer to freedom of assembly in apparent connection with the "right to associate into a union." Appellants' Brief at 9. The right of employees to join and participate in labor organizations *per se* is not, however, in any way relevant to this case.

> while affording a gardener on a private golf course that right, does not serve a compelling state interest. The reasons for the law denying public employees the right to strike while affording such right to private employees are not premised on differences in types of jobs held by these two classes of employees but upon differences in the employment relationship to which they are parties. *The legitimate and compelling state interest accomplished and promoted by the law denying public employees the right to strike is not solely the need of a particular governmental service but the preservation of a system of government in the ambit of public employment and the proscription of practices not compatible with the public employer-employee relationship."*

8 Cal. App. 3d at 315 (citation omitted) (emphasis added). Of course, the instant case involves not a "gardener on a public golf course," but employees whose work directly affects the health and welfare of four million citizens of this State. Thus, Appellants' argument is even less persuasive than that rejected in *City of San Diego.*

Appellants cite three cases in support of their constitutional arguments. *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union,* 61 Cal. 2d 766, 40 Cal. Rptr. 233, 394 P.2d 921 (1964), *cert. denied,* 380 U.S. 906 (1965), which dealt with picketing on private property, was cited as distinguishable in *Evankovich, supra,* 69 Cal. App. 3d at 48. Similarly, *Bagley v. Washington Township Hospital District,* 65 Cal. 2d 499, 55 Cal. Rptr. 401, 421 P.2d 409 (1966), a case involving the constitutionality of prohibiting the political activities of public employees, was held inapposite by the court in *City of San Diego, supra.* There, the court tersely noted:

> "The no-strike rule is not a restriction on the political activities of public employees."

8 Cal.App.3d at 314 n. 1. The third case Appellants cite in support of their oft-rejected constitutional argument, is *Robins v. Pruneyard Shopping Center,* 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), *aff'd,* 447 U.S. 74 (1980). The issue in that case was whether a private shopping mall could constitutionally prohibit a group of high school students from soliciting signatures on a political petition on mall premises. Obviously, this case provides no support for a constitutional right to strike.

In conclusion, the dearth of factual or legal support for Appellants' arguments is painfully obvious. They must therefore be rejected.

3. The Award of Damages Is An Appropriate Remedy for Appellants' Illegal Strike Activity.

Appellants also attack the propriety of a damage award even for otherwise illegal strike activity. The law is clear, however, that the trial court was empowered to award to the District damages caused by Appellants' illegal work stoppage on two independent bases. First, damages were appropriately awarded in tort for Appellants' wrongful and illegal conduct. Second, damages were appropriately awarded under the court's "clean up" jurisdiction in equity.

a. *Tort Damages.*

Pasadena, supra, recognized the independent right of a public employer to recover tort damages caused by an illegal strike. In that case, the plaintiff school district had sought recovery of damages based on a theory of tortious inducement of breach of contract, and on a theory of "direct liability for harm resulting from unlawful acts." 72 Cal. App. 3d at 111. Regarding the latter theory, the court held:

> "Moreover, liability can be imposed on defendants upon a theory wholly independent of tortious induce-

> ment to breach the teachers' contract with plaintiff. *The conduct of an unlawful strike is itself a tort for which damages may be recovered.*"

72 Cal. App. 3d at 112 (emphasis added).

Clearly, "the conduct of an unlawful strike" caused the District damage in this case which, under *Pasadena,* may be recovered in tort. *See also State of California v. City and County of San Francisco, supra* (recovery of civil penalties for strike-caused damage against both employer and striking union); *Caso v. District Council 37, supra* (tort damages awarded to municipalities injured by discharge of untreated sewage against striking union).

Appellants attempt to meet the well-established rule that tort damages may be recovered for an illegal public employee strike with a single, involuted argument. Appellants claim that the California Supreme Court's decision in *City and County of San Francisco v. Cooper, supra,*[18] is inconsistent with the tort damage remedy recognized in *Pasadena.* Appellants hypothesize that if San Francisco, under the facts of *Cooper,* had sued the striking labor organizations for damages, the Court would, under *Pasadena,* have been able to award such damages. Appellants reason that the fruits of the illegal strike in *Cooper, (i.e.,* the added economic cost of the MOU), would constitute tort damages under *Pasadena,* and rhetorically ask: "How can San Francisco, on one hand, sue for such damages, and on the other hand, be held liable on the enforceable [MOU] for the increased salaries?" Appellants' Brief at 5.

Appellants' confusing attempt to demonstrate a logical inconsistency between *Cooper* and *Pasadena* is without merit. As noted in Part III(A)(1), *supra,* the *Cooper*

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[18] *Cooper* is discussed in Part III(A)(1), *supra.*

court enforced the salary ordinance because the courts have no authority to investigate legislative motives. For the same reason, the *Cooper* Court could not have awarded damages in Appellants' hypothetical lawsuit, because the Court could not constitutionally decide whether the increased salary costs were "caused by" an illegal strike, a necessary element of the tort recognized in *Pasadena.*

Thus, *Cooper* is perfectly consistent with the damage remedy in *Pasadena* and in the case at bar. In *Pasadena,* as here, there are no constitutional separation of powers considerations entangled in the damage causation question, as there would be in Appellants' hypothetical damage suit. Thus, the alleged inconsistency between *Cooper* and a damage remedy for illegal public employee strikes is based on patently incorrect premises and must be rejected.

b. *Damages Under Equity "Clean Up" Jurisdiction.*

Apart from the trial court's power to award tort damages, the trial court also retained equity jurisdiction under which "clean up" damages could be awarded. "It is the general rule that such damages as are properly incidental to the principal [equitable] relief sought may be recovered; and this is true as to incidental damages sustained after the suit is brought." 38 *Cal. Jur.* 3d, Injunctions, § 91 at 604 (1977) (citations omitted). The trial court issued its Temporary Restraining Order on July 6, 1976. For the next 11 days, Appellants cavalierly ignored the court's order, causing damage for which the District seeks recompense, and to which the District is entitled.[19] *See Steiner v. Long Beach Local No. 128,* 19 Cal.

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[19]Appellants argue, in a cryptic footnote, that such "clean up" damages are not supported by precedent or other authority, "since there is a different purpose and burden of proof regarding a violation

2d 676, 685-86, 123 P.2d 20 (1942); *Sapiro v. Frisbee,* 93 Cal. App. 299, 270 Pac. 280 (1928).

B. The Superior Court's Damage Award Must Be Affirmed in All Respects.

As previously noted, the trial court awarded the District damages in the amount of $246,904.00. As calculated in the court's Minute Order, dated April 27, 1981, the court arrived at this figure by starting with $375,347.00 in overtime costs and other strike-related expenses. From this, the court deducted savings to the District of unpaid salaries of striking employees, and related savings for unpaid FICA,[20] pension and overtime and added back in the cost to the District of continued health insurance coverage.

Appellants stipulated at trial, with one minor exception,[21] that the District's overtime expenses were actually incurred. Nor do Appellants dispute that the District actually paid the other expenses included in the

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of an injunction," citing *Stafford v. United Farm Workers,* 33 Cal. 3d 319, 188 Cal. Rptr. 600, 656 P.2d 564 (1983). Appellants' Brief at 9 n. 17. This case involved the vicarious liability of the United Farm Workers, for injuries the plaintiff sustained in a traffic accident, allegedly caused by the negligence of picketers in parking their vehicles. The Supreme Court held that a TRO restraining certain conduct of the picketers was irrelevant to the negligence action, was prejudicial and was, therefore, erroneously admitted into evidence, *Stafford* is obviously irrelevant to Appellants' unclear proposition. In the absence of relevant precedent or argument, the trial court's authority to award incidental damages under its equitable power to enjoin the illegal strike is clear.

[20]FICA refers to Social Security contributions.

[21]Appellants argue that compensatory time off, included as $16,040.00 of the overtime expense in the award was not an appropriate item of damage, as the District allegedly did not prove any damage associated with this item. This contention is discussed in Part III(B)(2)(b), *infra.*

$375,347.00 figure. Appellants' quarrel with the trial court's findings of fact in regard to the amount of damages rests on four basic contentions: (1) that the level of staffing during the strike and other strike-related measures were unnecessary and unreasonable; (2) that the District incurred no costs for strike-related compensatory time; (3) that the method by which time and payroll records were kept during the strike was inadequate; and (4) that some of the overtime expense was not properly payable. Each of these assertions will be discussed below, in the context of the appropriate standard of appellate review.

1. The "Reasonableness" of the District's Response to Appellants' Illegal Strike Must Be Reviewed as a Finding of Fact.

a. *Appellate Standard of Review.*

The "fundamental doctrine [of appellate review] stated and applied in hundreds of cases," 6 B. Witkin, *Cal. Proc.*, Appeal § 245 at 4237 (2d ed. 1971), is that the trial court's judgment and factual findings and inferences drawn therefrom will be upheld if there is any substantial evidence to support them. *See, e.g., In re Marriage of Mix,* 14 Cal. 3d 604, 614, 122 Cal. Rptr. 79, 85-86, 536 P.2d 479 (1975); *Estate of D'India,* 63 Cal. App. 3d 942, 950, 134 Cal. Rptr. 165, 169 (1976); *Nestle v. City of Santa Monica,* 6 Cal. 3d 920, 925-26, 101 Cal. Rptr. 568, 571, 496 P.2d 480 (1972); 6 B. Witkin, *Cal. Proc.,* Appeal § 249 at 4241, § 254 at 4245-46 (2d ed. 1971); *compare Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951) (NLRB's findings of fact upheld if supported by substantial evidence on the record *as a whole).*

b. *The District's Entitlement to Damages for Various Expenditures Is a Question of Fact.*

The basis for the District's damage claim is its right to recover the cost of reasonable actions taken to avoid the harmful, potential effects of Appellants' illegal strike. *See* 23 *Cal. Jur.* 3d, Damages §§ 40-42 (1982); *see also, Barnes v. Berendes,* 139 Cal. 32, 72 Pac. 406 (1903); *modifying on other grounds,* 139 Cal. 39, 69 Pac. 491 (1902); *Pacific Telephone & Telegraph Co. v. Granite Construction Co.,* 225 Cal. App. 2d 765, 37 Cal. Rptr. 727 (1964). The primary damage issue resolved by the trial court was whether the District's actions, for which costs were admittedly incurred, were "reasonable."

It is axiomatic that the determination of "reasonableness" in this and other contexts is a question of fact. *See, Green v. Smith,* 261 Cal. App. 2d 392, 397, 67 Cal. Rptr. 796 (1968); *Sackett v. Spindler,* 248 Cal. App. 2d 220, 239, 56 Cal. Rptr. 435, 447 (1967); *Basin Oil Co. v. Baash-Ross Tool Co.,* 125 Cal. App. 2d 578, 601, 271 P.2d 122, 135-36 (1954). Thus, under the standard of appellate review set forth above, the question on appeal is limited to whether there is substantial evidence in the record to support the trial court's findings that the District's response to the illegal strike was reasonable. Further,

> "[t]he reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight."

Green v. Smith, supra, 261 Cal. App. 2d at 396; *see also, Huntington Beach Union High School District v. Continental Information Systems Corp.,* 621 F.2d 353, 357 (9th Cir. 1980), quoting *Green v. Smith* with approval; *Basin Oil Co. v. Baash-Ross Tool Co., supra.* As demonstrated below, substantial evidence supports the trial court's findings of

fact, and its proper application of the test outlined in *Green v. Smith.*

2. The Record Contains Substantial Evidence Supporting the Judgment and Underlying Findings of Fact and Must Be Affirmed.

Much of Appellants' Opening Brief is devoted to a rehash of the evidence.[22] Appellants' contention that some evidence allegedly favors a reduction in the damage award is, however, hardly the necessary demonstration that *no* substantial evidence supports that award. *Overton v. Vita-Food Corp.*, 94 Cal. App. 2d 367, 370, 210 P.2d 757 (1949). Appellants' discussion is, therefore, largely irrelevant. Moreover, substantial, indeed overwhelming, evidence supports the trial court's findings that the District's response to Appellants' unlawful strike was "reasonable" and "proper." *See* Findings of Fact, ¶¶ 10, 11 & 12 (C.Tr. 483-84).

a. *The District's Staffing and Other Expenses During the Strike Were Reasonable and Necessary.*

Appellants attack the trial court's finding that the District's staffing was "reasonable in the light of the strike situation that confronted the District between July 5, 1976 and July 18, 1976," Findings of Fact, ¶ 10 (C.Tr. 483), alleging that extra personnel and longer hours resulted in excessive overtime expenses.[23] The record contains clear and substantial evidence, however, supporting the trial court's finding in every respect.

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[22]Significantly, Appellants make no claims of error, prejudicial or otherwise, in the trial court's evidentiary rulings.

[23]As noted, the parties have stipulated that all overtime expenses were actually paid. (R.Tr. 15) Whether the trier of fact's finding that all such expenses were proper is discussed in Part III(B)(2)(d), *infra. See* Findings of Fact, ¶ 11 (C.Tr. 483-84).

In preparing for the 1976 strike, the District's primary concern was to insure continued operation of the sewage treatment plants,[24] and the landfills. (R.Tr. 356) To minimize strike-related disruption and maximize the chances of successfully operating the treatment plants, the District prepared strike-contingency plans. (Ex. 145; R.Tr. 358) The strike-contingency plans were not, however, created in a vacuum. The District had undergone its "baptism of fire" in the 1974 strike, and knew what was necessary to keep the plants and landfills operative. The District was also aware that the 1974 strike had involved virtually 100% of the blue-collar employees (R.Tr. 711), and strike-related sabotage and vandalism. (R.Tr. 358)

Against this background, the strike-contingency plans provided for 24-hour staffing for all sewage treatment plants and maintenance yards with at least two management or professional employees for each facility. (R.Tr. 260, 269, 283-84) Guards from various security services were hired for added security at the JWPCP. (R.Tr. 325-26) The District's witnesses repeatedly testified that these measures were necessary for plant security and emergency response capability. (*E.g.*, R.Tr. 260, 269-71, 283-84, 946, 952) Indeed, Roger Beeken testified that staffing the treatment plants on a smaller scale would have been "irresponsible." (R.Tr. 938)

The landfill strike-contingency plan required similar staffing. First, rather than the normal, overlapping shifts, where 30-40% of the landfill employees began working approximately ½ hour before the landfill opened to the public, with the other 60-70% arriving some two hours later and remaining for a corresponding longer period,

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[24]The drastic monetary, ecological and public health consequences of dumping billons of gallons of raw sewage into the Pacific Ocean discussed above, needs no emphasis here.

the District required all landfill employees during the strike to report at the earlier time. (R.Tr. 362-63, 974) The staggered shift was eliminated during the strike so management would have sufficient notice of the availability of personnel. (R.Tr. 359-60) Further, operations at each landfill were consolidated to one location, and acceptance of liquid waste was curtailed. (R.Tr. 362-63) Extra guard services were obtained for round-the-clock security at each landfill. (R.Tr. 367)

Appellants question the necessity of security and staffing measures. One major theme running throughout Appellants' argument is that nothing happened during the strike to justify the staffing set forth in strike-contingency plans. Not only is the factual premise of this argument incorrect,[25] it is irrelevant to whether the District's staffing during the strike was reasonable. Appellants' argument seems to be that the District's strike-contingency plans were *too* successful in averting strike-related damage. Had the District experienced more problems, demonstrated that operation of landfills or treatment plants was curtailed or perhaps been able to point to significant injury to property or the environment, *then,* Appellants apparently argue, the District's response to the strike would have been reasonable. (*See* R.Tr. 1038-41) In the absence of these or similar showings, Appellants maintain, the District's staffing was excessive. Placed in perspective, this argument requires no refutation. Certainly, had operation of treatment plants or landfills actually been curtailed or halted, Appellants doubtless would have argued that staffing measures were inadequate. In any event, the District's success in averting the potentially disastrous consequences of Appellants' unlawful conduct, is simply irrelevant to the reasonableness of the District's actions.

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[25]*See* discussion, *supra,* at pp. 15b-17b.

A second theme in Appellants' attack is that the District's staffing should have been curtailed at facilities where non-striking blue-collar workers were available in sufficient numbers. This argument overlooks several significant facts. Even in those locations where significant numbers of blue-collar employees came to work, the District had no guarantee that they would continue to work. Appellants would discount this concern "as it cannot be assumed that an employee who decided not to go on strike would then, during the course of the strike, leave his work." Appellants' Brief at 18 n. 22. Appellants ignore the undisputed fact that *they* attempted throughout the strike to persuade non-strikers to leave their work. (R.Tr. 860-62, 1055-56) Certainly, Appellants would not have attempted to persuade non-strikers to join the strike if there were no hope of success. Furthermore, Local 660's own "Strike Bulletin" dated July 14, 1976, asserts "that a number of the guys now crossing the line are willing to join the picket lines." (Ex. 188) Appellants themselves therefore made precisely the assumption they now contend is without merit.

Moreover, there is evidence that the District's management personnel believed some employees had initially reported to work, only to join the strike thereafter. (R.Tr. 939, 949) Clearly, a good faith belief that non-striking blue-collar employees might join the work stoppage is sufficient to render the District's continued staffing reasonable. *See Barnes v. Berendes, supra.* In any event, the District did reduce management staffing levels during the strike where it appeared that blue-collar non-strikers would remain on the job in facilities where, for example, little picketing or other disruption had occurred. (R.Tr. 762, 924, 947-50, 1229)

A third aspect of Appellants' argument is the suggestion of alternatives to the District's strike-contingency

plans. With keen "20-20 hindsight" Appellants argue, as they argued to the trial court, that the District could have eliminated a great deal of overtime expense with alternative staffing responses to the strike. (Ex. 368); Appellants' Brief at 20-21. Similarly, Appellants suggest that the District could have relied on its ADT alarm system or guards[26] for security rather than require the constant presence of two management employees. Appellants' Brief at 18.

Here, again, there is substantial evidence in the record not only that the District's response to the strike was reasonable, but also that Appellants' "alternatives" were clearly not. In the JWPCP, for example, Appellants' suggested 12-hour shifts for available personnel would have required operating the JWPCP with only 360 man-hours per day. During normal operation, the JWPCP is staffed with employees working a total of over 1800 man-hours per day. (R.Tr. 935-36) Thus, Appellants' alternative was to have operated the JWPCP with 20% of the man-power utilized in normal operation, rather than with the allegedly unreasonable 40% staffing level the District maintained during the strike.

The record also clearly supports the inference that reliance on an alarm system alone for security would have been unreasonable. The District's witnesses testified that the alarm system merely notified appropriate personnel of malfunction and that the non-critical malfunctions which normally occur are not comparable to the serious damage a knowledgeable saboteur could wreak. At best, therefore, the alarm would not have informed management in time to avert potentially serious damage. (R.Tr. 936, 945) In

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[26]Ironically, Appellants question the necessity of guards at some locations, while suggesting that guards were preferable to 24-hour staffing at other locations. (R.Tr. 325-27, 946-48); Appellants' Brief at 18, 22.

any event, even if Appellants' alternatives were reasonable, "the person whose wrong forced the choice cannot complain that one rather than the other is chosen." *Green v. Smith, supra,* 261 Cal. App. 2d at 397.

A fourth argument apparently raised by Appellants is that even granting the necessity of the 24-hour presence of management and professional employees, the District allegedly should not have compensated these employees, and Appellants should not be liable, for hours they spent sleeping or otherwise "not working."[27]

The short answer to this unsupportable contention is found in the District's "Salary Resolution." (Ex. 130) As is clear from Section 5 of the Salary Resolution, the payment of overtime and the definition of employees eligible for such overtime was by reference to provisions of the Federal Fair Labor Standards Act ("FLSA"), 29 *U.S.C.* § 201 *et seq.*, "as if" that act had been applicable to the District. Thus, it was entirely appropriate for the trial court to examine the Regulations of the United States Department of Labor in administering the FLSA and by analogy, to apply those standards to the strike replacements who were required to work extremely long hours of overtime because of Appellants' unlawful strike activities.

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[27]In connection with this argument, Appellants point out a handful of alleged occurrences at a few of the smaller, more isolated facilities, to infer that management personnel were not always working during the strike. Thus, an alleged barbecuing incident at the Palmdale facility is mentioned no less than *three* times in Appellants' Brief, at 19-20; alleged reading and "walks" by one management employee, also at Palmdale, are mentioned no less than *five* times. Appellants' Brief at 19-20. The paucity of this evidence is merely emphasized by the "mileage" Appellants try to make out of it. In any event, the trier of fact was not required to credit either Appellants' evidence, or possible inferences drawn therefrom.

It is (and was in 1976) the general rule under the FLSA that if an employee is "suffered or permitted" to work overtime, even if not otherwise instructed or requested to do so, all time spent on overtime work is considered as "hours worked" (*i.e.*, as compensable time). *Armour & Co. v. Wantock,* 323 U.S. 126 (1944); 29 CFR § 785.11. Under appropriate circumstances, even the time that employees spend sleeping at the employer's premises is counted as "hours worked" if adequate sleeping facilities cannot be provided; if the employee cannot usually enjoy an uninterrupted night's sleep; or if the employee cannot get at least five hours of sleep during a scheduled sleeping period. The District's inability to provide a guarantee of at least five hours of uninterrupted sleep during the strike was established by the testimony of Roger Beeken. (R.Tr. 286-89) Thus, the *entire* time must be counted as working time. *General Electric Co. v. Porter,* 208 F.2d 805 (9th Cir. 1953), *cert. denied,* 347 U.S. 951 (1954); 29 CFR §§ 785.20 and 785.22.

The duties of managerial, professional and technical employees replacing blue-collar strikers were analogous to those required of ambulance drivers, firefighters and other types of employees, who spend a great deal of time waiting to respond to emergency situations. Thus, under the Department of Labor Regulations:

> "[A] stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, [a] fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity."

29 CFR § 785.15. As the strike replacements were on duty as much as 24 hours per day, and were not free from work responsibilities during such time, it was appropriate

and reasonable to compensate them for time spent eating or resting, 29 CFR §§ 785.18 and 785.19, whether such occurred on or off the treatment plants' or landfills' premises. *Armour & Co., supra; Skidmore v. Swift,* 323 U.S. 134 (1944); 29 CFR § 785.12.

Finally, a fifth argument raised by Appellants will be briefly addressed. Appellants attempted to show at trial, and again argue here, that staffing on Saturday, July 17, and Sunday, July 18, was excessive because the strike supposedly was over. However, upon closer examination it is clear that staffing on July 17 was substantially reduced (Ex. 134 through Ex. 139), and that so little overtime was worked on Sunday, July 18, that Appellants' own accountant could not even find it. (R.Tr. 1177)

Furthermore, although Saturday, July 17, was a regular workday at both the landfills and the sewage treatment plants, only about half the employees attended Local 660's meeting to ratify a new agreement on the *evening* of July 16, and Appellants took no special measures to contact the striking employees. (R.Tr. 1059-61, 631-32) In short, the record evidence supports the trial court's finding that the District's staffing and compensation policies during and immediately after the strike were entirely reasonable.

It would serve little purpose to address at length Appellants' other arguments as to the necessity and relation to the strike of other expenses. Suffice it to say that the reasonable necessity of each such expense, including meal costs, guard services, bedding supplies, etc., was supported by the testimony of District witnesses. (R.Tr. 295-97, 368-70) Appellants' dissatisfaction with the trial court's finding is, therefore, irrelevant.

b. *The Superior Court's Award of Damages for Compensatory Time-Off Is Supported by Substantial Evidence.*

Some of those employees required to work overtime during the 1976 strike elected to receive credit for "compensatory time" rather than to be paid for the overtime. (R.Tr. 59-64, 530-35) Compensatory time is a credit on an employee's record, allowing him paid time off in the future. *Id.* Appellants argue that the $16,040.00 awarded for compensatory time is not a proven element of damage, alleging that "there is no cost to the district if there are no replacements." Appellants' Brief at 10. Appellants' argument is frivolous and illogical.

First, there is no dispute that those employees electing compensatory time instead of overtime compensation were actually credited with the accrued right to take time off at some future date. Records were introduced which clearly demonstrate this accrual, and were supported with testimony. (Ex. 169 through Ex. 174; R.Tr. 92-93) The District was therefore obligated to these employees for compensatory time, in exactly the same manner as it is obligated to employees for accrued vacation or pension benefits. (R.Tr. 62-63); *see Longshore v. County of Ventura,* 25 Cal. 3d 14, 24, 157 Cal. Rptr. 706, 598 P.2d 866 (1979). Based on this evidence, the inference that employees entitled to take time off actually did so at some point is not only reasonable and supported in the record, it is also obviously one drawn by the trier of fact. (R.Tr. 62-63)

Second, Appellants' contention that "no replacement equals no cost" is a non sequitur. When an employee takes compensatory time off, he is paid the same as if he had worked. (R.Tr. 63) Thus, the District pays for employee services it does not receive. Therefore, regardless of whether the employee is replaced when he takes compen-

satory time off, the District clearly loses the reasonable value of the employee's services. The trial court properly concluded that such services are of the same value as the employee's wages.

Furthermore, the situation would not change, contrary to Appellants' suggestion, if the employee were in fact replaced. In that case, the District would pay the replacement employee's wages, but would receive the quid pro quo of the replacement's services. Whether or not an employee taking compensatory time off is replaced therefore has absolutely nothing to do with the District's damage.[28] The record evidence therefore clearly supports the trial court's award of $16,040.00 for the cost of accrued compensatory time credited for strike-related overtime.

c. *Substantial Evidence Supports the Superior Court's Reliance on the District's Payroll Records.*

Appellants also argue that the trial court should not have awarded damages for strike-related overtime expenses, because records establishing such damages were allegedly inadequate. The District's payroll and timekeeping methods, and the resulting business records, Appellants contend, were "inherently untrustworthy, as they were based on information given by employees who themselves had a personal interest in exaggerating the amount of overtime." Appellants' Brief at 14.

Appellants do not claim, nor could they, that the payroll records (Ex. 132 through Ex. 144) were incompetent

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[28]Indeed, the actual cost to the District for the strike-related, compensatory time was greater than $16,040.00, since this amount was based on wage rates *prior* to July 17, 1976, the effective date of the 1976-77 MOU. Thus, the wage rates of employees electing compensatory time were potentially *higher* when they took time off than during the strike when the compensatory time accrued.

or that the District did not actually pay the overtime expenses in accordance with such records. *Cf. Kitchel v. Acree*, 216 Cal. App. 2d 119, 30 Cal. Rptr. 714 (1963). (Damages based on inadmissible hearsay). In the absence of such claims, Appellants' argument is patently frivolous.

Appellants fail to mention that the timekeeping methods and records the District used during the 1976 strike, were in virtually all cases *identical* to normal record and timekeeping procedures.[29] (R.Tr. 46-48, 50, 85, 188-238) Moreover, the cross-checks and follow-up utilized in compiling these payroll records clearly demonstrate that Appellants' claim of inadequacy is incorrect in any event.[30]

In sum, Appellants' apparent claim that the District's payroll and timekeeping records were too untrustworthy

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[29]The only difference was that in some instances the employees who actually recorded hours at some facilities were not the employees who normally performed that job. (R.Tr. 188-238)

[30]The overtime paid during the strike was verified as follows. First, all hours worked by each employee at a given facility, including overtime, were recorded by the employee or employees having such responsibility at that facility, on a log, diary, or other record. Several such records, or back-up sheets, were admitted into evidence. (Ex. 134 through Ex. 139) Second, from the logs or back-up sheets, the responsible employee at each facility either prepared a special pay report for each employee (Ex. 133), or provided employees at the JAO with information by telephone, from which the special pay report for each employee was prepared. Third, each employee was required to sign his special pay report, certifying he had actually worked the overtime indicated thereon. (Ex. 169 through Ex. 174) Fourth, personnel department employees prepared a time roll from the signed special pay reports, and submitted it to the Los Angeles County Auditor-Controller, who prepared the payroll checks. (R.Tr. 188-238; Ex. 143)

to constitute substantial evidence completely misconceives this Court's function, and must be rejected.

d. *The Superior Court Correctly Concluded That Overtime Rates During the Strike Were Proper.*

Appellants' final complaint with the trial court's damage award is the allegedly improper payment of overtime to management and professional employees at time and one-half for all hours over 40 in one week. Neither the District's Board of Directors, nor the Salary Resolution (Ex. 130), Appellants argue, permitted the payment of overtime to management or professional strike replacements at that rate. Careful evaluation of the record reveals the lack of merit of Appellants' contentions.

As noted above, the Salary Resolution incorporates by reference the provisions of the FLSA. Thus, in accordance with the FLSA, the Salary Resolution divides the District's employees into "exempt" and "non-exempt" categories. The FLSA's basic rule was (and is) that non-exempt employees are to be paid at one and one-half times their hourly wage for all time worked in excess of 40 hours per week and that exceptions to that rule are to be narrowly construed against the employer. *Sutton v. Engineered Systems, Inc.*, 598 F.2d 1134 (9th Cir. 1979). Exempt employees, to whom this rule does not apply, include certain employees in *bona fide* executive, administrative, or professional capacities. 29 *U.S.C.* § 213. These exemptions generally are referred to as the "managerial" or "white collar" exemptions. The specific exemptions are not defined in the FLSA itself, but rather are set forth in regulations promulgated by the Wage and Hour Division of the U.S. Department of Labor. These regulations focus on two factors: the employees' duties and salary. The "test" for determining whether employees qualify for the exemptions are set out at 29 CFR §§ 541.101-541.103.

The managerial or professional exemption is lost, however, if an employee spends more than a specified percentage (*e.g.*, 20%, 29 C.F.R. § 541.3) of his hours during a workweek performing *non*-executive or *non*-professional duties.[31] If the exemption is lost, the employee is then treated for overtime purposes as non-exempt, and must be paid overtime accordingly. *Brennan v. Western Union Telegraph Co.*, 561 F.2d 477, 484 (3d Cir. 1977) *cert. denied, Western Union Telegraph Co. v. Marshall*, 434 U.S. 1063 (1978). Thus, under the express terms of the Salary Resolution, it was entirely appropriate to pay the strike replacements, who had lost their exempt status, the same level of overtime premium that would have been received by the striking employees if they had remained on the job and faithfully performed their duties. *See Adams v. City of Modesto*, 53 Cal. 2d 833, 3 Cal. Rptr. 561, 350 P.2d 529 (1960).

Even if Appellants were correct that the Salary Resolution does not authorize the payment of overtime to managerial and professional employees in this case, it does not follow that the trial court erred in including damages for the difference between overtime at time and one-half, and overtime in accordance with overtime for exempt employees under the Salary Resolution. The Salary Resolution is addressed to the District's normal, day-to-day operation. It was never intended to apply to an extraordinary or emergency situation, such as the strikes in 1974 and 1976, and did not, therefore, render inappropriate the overtime policy during the strike.

Moreover, completely apart from the Salary Resolution, the Board of Directors authorized the Chief Engineer to

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[31]It is undisputed that managerial and professional employees receiving overtime for "strike-duty" were performing blue-collar work. (R.Tr. 257, 286-87, 660-61, 853-55, 952)

"have sole control of the affairs of the . . . Joint Administrative Organization and of the administrative affairs of the individual Districts, subject to the terms of [the Joint Administrative Agreement] and to the directions of the Boards of Directors. . . ." (Ex. 120, ¶ 6, at p. 12) Thus, under the Joint Administrative Agreement, broad, executive powers were delegated to Mr. Parkhurst, the Chief Engineer, which included managing the District's response to the 1976 strike, and authorizing employee compensation — even if different from the Salary Resolution.[32] Appellants' arguments that the payment of overtime at time and one-half was unauthorized or improper, are therefore wholly lacking in merit.[33]

C. The Superior Court's Award of Prejudgment Interest Must Be Affirmed.

Appellants attack the trial court's award of prejudgment interest on the basis that such interest ostensibly may not be awarded under Sections 3287(a) or 3288 of the Civil Code, unless damages are "certain, or capable of being made certain by calculation." Here, Appellants argue, there was a "substantial dispute as to the amount

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[32]Section 6522 of the Health & Safety Code permits the District to "do any act necessary or proper to the complete exercise and effect of any of its powers, or for the purposes for which it was formed." Clearly, this broad grant includes the power to do such acts necessary to operate the District's facilities during strikes and to delegate authority to the Chief Engineer to do the same.

[33]There is no indication as to why the trial court declined to include in the damage award the 10% bonus given to employees at the various landfills for work performed during the 1976 strike. Appellants' contention that the trial court did so decline because the 10% bonus was allegedly not in accord with the Salary Resolution is mere speculation. Appellants' Brief at 13. Although there was evidence that the 10% bonus was for, *inter alia*, hours actually worked (R.Tr. 987-88), the trial court could have concluded that this bonus, unlike overtime compensation, was not for hours worked.

of damages," Appellants' Brief at 28, and damages were, therefore, not capable of being made certain by calculation.

Notwithstanding Appellants' contentions, the award of prejudgment interest was clearly proper on at least two independent bases. First, the trial court had discretion in equity and under Section 3288 of the Civil Code to award interest regardless of whether the damages were liquidated. Second, while the District's *entitlement* to various portions of the damage award was (and is) disputed, each such portion has always been "capable of" calculable certainty.

1. The Superior Court Properly Exercised Its Discretion to Award Prejudgment Interest.

Appellants' first premise that the liquidation requirements of Section 3287(a) of the Civil Code must be satisfied before prejudgment interest may be awarded is incorrect. On the contrary, it has long been the rule that the court acting in equity may award prejudgment interest in its discretion, regardless of the certainty of the damages. As the court in *McCowen v. Pew,* 18 Cal. App. 482, 123 Pac. 354 (1912), stated over 70 years ago:

> "In equitable actions, it is true, the rule of law as to interest is generally followed; 'but interest is some times allowed by courts of equity in the exercise of a sound discretion, when it would not be recoverable at law.' "

18 Cal. App. at 485 (citation omitted); *followed in, Smith v. Rickards,* 149 Cal. App. 2d 648, 308 P.2d 758 (1957); *see also Bank of America v. Ryan,* 207 Cal. App. 2d 698, 710, 24 Cal. Rptr. 739 (1962) (Interest allowable on unliquidated funds held in constructive trust); *Gherman v. Colburn,* 72 Cal. App. 3d 544, 587, 140 Cal. Rptr. 330 (1977) ("The law is clear that the jury may award

interest even on an unliquidated sum against a joint venturer who has violated his fiduciary duties."). In the instant case, the trial court acting under its equitable "clean up" powers had discretion to award prejudgment interest.

This discretion has been recognized in Section 3288 of the Civil Code. This section, enacted in 1872, provides:

> "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury."

Civil Code § 3288 (West 1970). The trial court[34] also had discretion under the express language of Section 3288 to award prejudgment interest, regardless of whether the damages in this case were liquidated.

Appellants dispute this discretionary power on the basis of two unsupported premises. First, Appellants contend that the liquidation requirement of Section 3287(a) has been judicially engrafted onto Section 3288. Appellants secondly maintain that Section 3288 requires *both* a "breach of an obligation not arising from contract" *and* a finding of "oppression, fraud, or malice," before the trial court has discretion to award prejudgment interest. Neither of these propositions is correct.

The California Supreme Court has interpreted Section 3288 in *Bullis v. Security Pacific Nat'l Bank,* 21 Cal. 3d 801, 148 Cal. Rptr. 22, 582 P.2d 109 (1978). There the Court expressly held:

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[34]Although Section 3288 refers only to the jury's discretion, it also empowers the trial court, acting as a fact finder, to award discretionary interest. *See Redke v. Silvertrust,* 6 Cal. 3d 94, 106, 98 Cal. Rptr. 293, 490 P.2d 805 (1971), *cert. denied,* 405 U.S. 1041 (1972).

> "[E]ven if plaintiff's damages are not liquidated, prejudgment interest may be awarded."

21 Cal. 3d at 814 (citations omitted). Appellants attempt to counter this clear statement, with a facile misreading of the Supreme Court's subsequent decision in *Greater Westchester Homeowner's Ass'n v. City of Los Angeles*, 26 Cal. 3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979), *cert. denied*, 449 U.S. 820 (1980), arguing that the Court in *Greater Westchester* required damages of calculable certainty for an interest award under Section 3288.

This reading of *Greater Westchester* is patently incorrect. There, the Court actually stated:

> "We have recently affirmed [in *Bullis*] that, *unlike Civil Code section 3287, which relates to liquidated and contractual claims, section 3288 permits discretionary prejudgment interest for unliquidated tort claims.*"

26 Cal. 3d at 102 (emphasis added). The Court went on to hold that Section 3288 discretionary interest was intended to compensate a plaintiff for property loss and should not be awarded on intangible damages such as physical suffering or emotional distress.[35] One reason for distinguishing between these types of tort damage, the Court opined, was that the *interest* on an amount of property damage was more easily and accurately calculated than on damages for pain and suffering. *Greater Westchester* clearly does not, however, incorporate a liquidation requirement into Section 3288. *See also Levy-Zentner Co. v. Southern Pacific Transportation Co.*, 74 Cal. App. 3d 762, 796 & n. 28, 142 Cal. Rptr. 1 (1977)

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[35]In the instant case, damages are unquestionably pecuniary. The discretionary interest award does not, therefore, run afoul of *Bullis* or *Greater Westchester*.

(Distinction between Section 3287 and Section 3288 is whether damages are "readily ascertainable.")

The *Bullis* decision also disposes of Appellants' second claim. There, the Court stated:

> "It is clear from th[e] language [of Section 3288] that a party does not have to prove both a breach of a noncontractual obligation *and* oppression, fraud or malice."

21 Cal. 3d at 814 (citations omitted) (emphasis by the Court). Appellants cite *Southern Pacific Transportation Co. v. State,* 115 Cal. App. 3d 116, 122, 171 Cal. Rptr. 187, 191 (1981). There, the Court stated that an award of prejudgment interest under Section 3288, like exemplary damages under Section 3294 of the Civil Code, required oppression, fraud or malice. This statement is not correct law, however, as it directly conflicts with *Bullis*. Furthermore, a comparison of Section 3288 and 3294 reveals the fallacy of the *Southern Pacific* court's reading of Section 3288 and 3294.[36] *See Canavin v. Pacific Southwest Airlines,* 141 Cal. App. 3d 577, 594 n. 9 & 595, ____ Cal. Rptr. ____ (1983), *reh'g granted* (rejecting *Southern Pacific*).

In sum, Appellants' contention that either liquidation or malice, fraud, or oppression must be proved before the

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[36]Section 3294(a) reads in part:

> "In an action for the breach of an obligation not arising from contract, *where* the defendant has been guilty of oppression, fraud, or malice. . . ."

Civil Code § 3294 (West Supp. 1982) (emphasis added). As noted, Section 3288 provides:

> "In an action for the breach of an obligation not arising from contract, *and* in every case of oppression, fraud, or malice, . . ."

Civil Code § 3288 (West 1970) (emphasis added).

trier of fact may award prejudgment interest on tort damages is simply unsupported and incorrect.[37]

Further, the trial court properly exercised its discretion in awarding prejudgment interest. Appellants willfully and intentionally engaged in an illegal strike, and for eleven days blatantly ignored an injunction against this conduct. Under these circumstances, and considering that the District's loss was entirely pecuniary, the trial court's award of prejudgment interest was a proper exercise of its discretion.

2. The Damages Awarded by the Superior Court Were Capable of Being Made Certain by Calculation.

Assuming, *arguendo*, that the liquidation requirement of Section 3287(a) of the Civil Code must be met before prejudgment interest is appropriate, the damages awarded in this case clearly meet this standard. In this regard, Appellants confuse the certainty of *entitlement* to damages with the certainty of *amount* of damages. Section 3287(a) has never required the former, as the cases Appellants cite clearly established.

Appellants list several factors in their Brief which allegedly demonstrate the uncertainty of the damages in this case. Appellants' Brief at 28-29. Initially, those items listed as "offsets," *id.* at 28-29 (¶¶ 7-10), are irrelevant. The law is clear that even an unliquidated offset does not

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[37]Of course, Section 3287(a) may apply to damages not arising from breach of contract as well as to contract damages. Because interest is mandatory under Section 3287(a), but only discretionary under Section 3288, plaintiffs have occasionally sought prejudgment interest on tort damages under Section 3287 on appeal, where the trial court failed to award it. *See, e.g., Leff v. Gunther*, 33 Cal. 3d 508, 189 Cal. Rptr. 377, 658 P.2d 740 (1983); *Levy-Zentner Co. v. Southern Pacific Transportation Co., supra.* Liquidation must be shown to obtain prejudgment interest as of right under Section 3287(a), but is irrelevant to a discretionary award under Section 3288.

affect a plaintiff's right to prejudgment interest on the net recovery. *See Lineman v. Schmid,* 32 Cal. 2d 204, 212, 195 P.2d 408 (1948) and cases cited there; *Leaf v. Phil Rauch, Inc.*, 47 Cal. App. 3d 371, 120 Cal. Rptr. 749 (1975).

Several other items on this list detail the various calculations which have been made over the course of the litigation, which have resulted in divergent totals for the amount of damages. *E.g.,* Appellants' Brief at 28 (¶¶ 3-6). This divergence is, however, merely a function of the fact that the "total" damage award includes scores of component items. Appellants have disputed only *entitlement* to individual components. Thus, the factual resolution in this case was only whether a particular component of damage or of offset was "in or out" of the total. This type of mechanical computation is precisely the certainty intended in Section 3287(a). *See Leff v. Gunther, supra.*

The other items in Appellants' list are similarly irrelevant. The fact that the damage total has been recalculated and adjusted or that the damage award is less than the original claim, does not preclude an award of prejudgment interest. *Coleman Engineering Co. v. North American Aviation,* 65 Cal. 2d 396, 55 Cal. Rptr. 1, 420 P.2d 713 (1966). Similarly, the alleged requirement that the District must have supplied a correct calculation of the total damage claim and underlying data before interest could begin to accrue, is not supported by relevant precedent. The cases Appellants cite for this proposition involve disputes respecting the value of property or services[38] In those cases, the courts occasionally required the plaintiff to support his valuation with data if such was not readily accessible to the defendant, before interest began to

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[38]Even where value of services or property is disputed, if it is calculable from fair market value, the provisions of Section 3287 apply. *See e.g., Executive Aviation, Inc. v. National Insurance Underwriters,* 16 Cal. App. 3d 799, 94 Cal. Rptr. 347 (1971).

accrue. Certainly, however, there is no requirement to be gleaned from these cases that documentation must be supplied if the value of the services or property, in the instant case the value of employee services, guard services and various strike-related expenditures, is undisputed.

The trial court properly awarded prejudgment interest both as a matter of sound discretion and as a matter of law. This interest award must therefore be upheld.

IV.

CONCLUSION.

In summation, the trial court's findings of fact are supported by substantial evidence. The trial court's conclusions of law are in accord with dispositive statutes and judicial precedent. Appellants raise no argument that the trial court's evidentiary or discretionary rulings were in error. The judgment must therefore be affirmed in all respects.

Los Angeles, California.
Dated: June 27, 1983.

Respectfully submitted,

MUSICK, PEELER & GARRETT,
By STUART W. RUDNICK,
STEVEN D. WEINSTEIN,
NEIL O. ANDRUS,
Attorneys for Respondent.

APPENDIX C

APPENDIX C

2ND CIVIL NO.

66088

In the Supreme Court of the State of California

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, a public agency,
Plaintiff and Respondent,

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER, GARY SCHALANDER, BILLY MANNING,
Defendants and Appellants.

Appeal from the Superior Court of Los Angeles County.
Hon. Charles H. Older, Judge

PETITION FOR HEARING

LEO GEFFNER,
and
JEFFREY PAULE,
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A Professional Corporation,
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IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, a public agency,
Plaintiff and Respondent,

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; VICTOR N. HOCHEE, HARRY GLUCK, JACK ROBERTS, ANTHONY BUTKA, EUGENE MILLER, GARY SCHALANDER, BILLY MANNING,
Defendants and Appellants.

PETITION FOR HEARING

To the Honorable Rose E. Bird, Chief Justice, and the Honorable Associate Justices of the Supreme Court of California:

Petitioners Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO, Victor N. Hochee, Harry Gluck, and Jack Roberts hereby respectfully petition this Court for a hearing following the decision of the Court of Appeal, Second Appellate District, Division Two, filed on October 12, 1983, and attached hereto as Appendix "A". On November 2, 1983, the Court of Appeal modified the decision. A copy of the modification is attached hereto as Appendix "B".

I.

PRELIMINARY STATEMENT.

Los Angeles County Employees Association, Local 660, Service Employees International Union, AFL-CIO (Union) is the certified bargaining representative of the blue collar employees employed by the County Sanitation District (District). The District is a local public agency covered by the Meyers-Milias-Brown Act (MMBA), Government Code Sections 3500, *et seq.* On July 5, 1976, the employees of the district commenced a strike which was in effect until July 12, 1976. Upon the commencement of the strike, the District filed a Complaint for Injunction and Damages, and was granted a Temporary Restraining Order. Subsequently, an Order to Show Cause Re Contempt was filed and a hearing was set for July 27, 1976. After the strike was settled, the Union and the District entered into a stipulation that the strike was in effect for three separate days, and a fine in the amount of $1,500.00 was assessed by the Superior Court. The District filed an Amended Complaint on June 12, 1979 amending the Prayer for Damages on the Second Cause of Action. A trial was held before the Superior Court from March 18, 1981 to April 6, 1981. The Superior Court held that the strike was a public employee strike and was therefore unlawful, and that the Union was liable for damages, and assessed compensatory damages against the Union and three staff employees in the amount of $246,904.00 with pre-judgment interest. The Court of Appeal upheld liability as a tort under *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977), 72 Cal.App.3d 100. However, the Court of Appeal reduced the damages to $163,814.00, holding that the Superior Court had erred in allowing damages at time and a half pay for management, executive and professional employees where the District's Salary Ordinance required straight time only for overtime

work for such employees. The Court of Appeal held that to prohibit such a strike and allow damages was not violative of the constitutional rights of the Union or the employees. Further, the Court of Appeal held that a claim that the District had committed unfair bargaining practices under the MMBA was not a defense to liability. The Court of Appeal upheld the Superior Court in allowing damages for overtime paid to the management, executive and professional employees for 24 hours each day for the period of the strike, including pay for sleeping, eating, and driving to and from restaurants, etc., and rejected the Union's position that such staffing and payments were unreasonable and that there were no reasonable efforts to mitigate damages. The Court of Appeal also upheld the granting of pre-judgment interest.

II.

SUMMARY OF REASONS WHY THE PETITION FOR HEARING SHOULD BE GRANTED.

A. The Supreme Court Has Not Decided the Issue as to the Legality of a Public Employee Strike and Tort Liability.

This case presents issues of extreme importance to public sector labor-management relations, namely whether a public employee union and the employees of a local public agency have the right to engage in a peaceful strike by withholding services and to engage in peaceful picketing. Further, if such a strike and picketing occur, whether the Union and its staff employees are liable for damages as a tort.

The various Courts of Appeal have held that public employees are denied the right to strike and picket, and if such conduct does occur, then the Superior Court, under

the California common law, can, on a *per se* basis, issue an injunction and/or grant damages. (Appendix "A", p. 5.) However, in many of such cases, including the instant case, the Courts of Appeal have stated that the Supreme Court has not made a clear and definitive ruling on the legality of public employee strikes, and that in the absence of such a Supreme Court decision, the Court of Appeal is obligated to hold that a strike by public employees in local government is unlawful and therefore is a tort, and that damages may properly be assessed against a union and its staff employees.[1]

In *El Rancho Unified School District v. National Education Association* (1983), 180 Cal.Rptr. 809, 815, the Court of Appeal stated:

> "If the well-settled rule denying public employees the right to strike no longer represents the view of our Supreme Court, it is the province of that court to say so. Its declination in *San Diego* to pass on the question adds nothing to its earlier decision similarly declining to resolve the question."[2]

In *People ex rel. State of California, Seal Beach Police Officers Assn. v. City of Seal Beach* (1983), 146 Cal.App.3d 1099, 1103, the Court of Appeal, in holding that the city had violated the MMBA by failing to meet and confer in good faith with the Police Officers Association prior to

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[1]Although not an issue in this case, the logical result would be that each of the striking employees would also be subject to tort liability and personal damages.

[2]The Supreme Court granted a hearing in *El Rancho* and held that the Superior Court did not have jurisdiction to grant damages, as the subject matter and any remedy were within the jurisdiction of the Public Employment Relations Board. *El Rancho Unified Sch. Dist. v. National Education Assn.* (1983), 33 Cal.3d 946. The legality of public employee strikes was not addressed.

adopting certain charter amendments, stated in footnote 1:

> "The [union does] not call upon the court to consider whether public employees have a right to strike. Therefore we express no opinion on this issue. However, we do note, contrary to the City's assertion, it is not 'well settled' that public employees have no right to strike. (See *International Brotherhood of Electrical Workers v. City of Gridley* (1983), 34 Cal.3d 191.)"

In *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers, supra,* the Court of Appeal stated:

> "There is no square holding of our Supreme Court passing upon the legality of strikes by public employees. . . . " 72 Cal.App.3d at 105.

In the instant case, the Court of Appeal stated:

> "While we recognize that often 'coming events cast their shadows before' and certain expressions and decisions such as *International Brotherhood of Electrical Workers v. City of Gridley, supra,* 34 Cal.3d 191, 199, fn. 7; *El Rancho Unified School Dist. v. National Education Association, supra,* 33 Cal.3d 946, 957, 958, 962-964; *San Diego Teachers Association v. Superior Court, supra,* 24 Cal.3d 1, 6-7, 13; and *City and County of San Francisco v. Cooper, supra,* 13 Cal.3d 898, 912, may have prophetic value, as an intermediate appellate court we remain bound by the presently well-settled rules that deny employees the right to strike and which subject those who do engage in such unlawful practices to tort actions for damages. If these rules should no longer represent the considered view of our Supreme Court, it is the exclusive province of that body to so declare." (Appeals "A", p. 9.)

This Court has repeatedly stated that the question of the legality of public employee strikes is an open issue in California.

Commencing with *In re Barry* (1968), 68 Cal.2d 137, 151, the Court stated that it was expressing no opinion on "the question whether strikes by public employees can be lawfully enjoined". This issue was also held open in *City and County of San Francisco v. Cooper* (1975), 13 Cal.3d 898, at p. 912, where the Court stated, "We have no occasion to resolve this controversy in the present action . . ." In *San Diego Teachers Assn. v. Superior Court* (1979), 24 Cal.3d 1 at p. 7, the Court stated:

> "Similarly, it is unnecessary here to resolve the question of the legality of public employee strikes if the injunctive remedies were improper because of the District's failure to exhaust its administrative remedies under the EERA."

Justice Richardson, dissenting in *San Diego Teachers Association, supra,* stated that for the Supreme Court to leave the question of the legality of public employee strikes open was contrary to the longstanding and numerous Court of Appeal cases, as well as *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960), 54 Cal.2d 684.

In *El Rancho Unified School District, supra,* the Supreme Court again found it unnecessary to pass on this issue. However, in concurring opinions by Justices Richardson and Grodin, the issue of the legality of public employee strikes was strongly debated. justice Richardson expressed some dismay that the Court did not decide this issue, and stated:

> "This Court should no longer continue its hesitant, tentative ritual dance around the parameter of the

central legal principal, but honestly, openly and forthrightly enforce it . . ." 33 Cal.3d at 962.

Justice Grodin, in an equally emphatic concurring opinion, stated that the question of the legality of public employee strikes is not that resolved and clear, as was urged by Justice Richardson. Justice Grodin presented an analysis that since the developments regarding public employee collective bargaining, the passage of the MMBA, and the numerous decisions interpreting the MMBA as providing a state-mandated collective bargaining system, the ". . . original policy foundation for the 'rule' that public employee strikes are illegal in this state has been substantially undermined, if not obliterated." 33 Cal.3d at 963-964.

In *International Brotherhood of Electrical Workers v. City of Gridley,* 34 Cal.3d 191, 210, Justice Richardson, in a concurring and dissenting opinion, again repeated that in his opinion, "[p]ublic employee strikes are illegal [and] [t]hey cannot and should not be condoned." He urged the majority of the Supreme Court to acknowledge and decide on his point of view, stating, "My colleagues should forthrightly, clearly and unmistakably acknowledge this."[3]

This Court should grant a hearing in view of the fact that public employee strikes in California under the MMBA have taken place and will reoccur in the future. Since the Supreme Court has expressly reserved a decision on this issue and in view of the candid invitation by the Courts of Appeal for a ruling by the Supreme Court, Petitioners submit that this case, which provides a de-

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[3]Although Petitioners respectfully disagree with the conclusion sought by Justice Richardson, his statements strongly suggest that this issue should be decided by the Supreme Court.

tailed record of the collective bargaining process in local government under the MMBA, resulting in a substantial damage award, presents the Supreme Court with compelling reasons to grant a hearing.

B. Damages Against the Union and Employees Under the California Common Law Are Inconsistent With the *Cooper* Case.

The Supreme Court in *City and County of San Francisco v. Cooper, supra,* held that a settlement agreement between the unions representing city and county and school employees and the public employers were legally enforceable under the MMBA,[4] even though the settlement resulted from a public employee strike. The Supreme Court did not rule on the legality of the strike, but held that the Superior Court had no right to go beyond the legislative determination of the public employer to agree to the settlement arising out of the strike. The result of the *Cooper* case is totally inconsistent with the law as applied by the Court of Appeal in this case. In *Cooper*, the public employees went on strike because of what in their opinion constituted an inadequate salary increase offer by the City and County of San Francisco and the school district. The strike settlement provided for the public employers to pay additional salaries beyond the amounts that were offered at the commencement of the strike, resulting in millions of dollars of increased cost to the City, County and school district. If the Court of Appeal decision in this case is allowed to stand, then the

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[4]The school district in *Cooper*, at the time of the strike, was subject to the Winton Act (Education Code 1959, Section 13080), superseded by EERA (Government Code Sections 3540-3549), which provides for a collective bargaining system for school employees. The City and County of San Francisco was and is presently covered by the MMBA.

result is that a public entity, following a strike, may enter into a settlement that provides increases in salaries and fringe benefits to the striking employees, and such increased salaries and fringe benefits will be lawful and legally enforceable under *Cooper*, but the public agency could then sue the union, its staff employees, and presumably its own employees who were on strike, to recover, as damages, the amount of the increased salaries paid as a result of the strike.[5]

C. The Court of Appeal Decision Is Contrary to a Modern Industrial Society Under the California Common Law and the Meyers-Milias-Brown Act, Where Public Employees Are Organized and Represented by Unions and Negotiate on Wages and Conditions of Employment With Local Governments and Engage in Strikes as Part of the Collective Bargaining Process.

A common law that provides for *per se* tort liability and damages is inconsistent with the MMBA. The MMBA provides a comprehensive state-mandated process to resolve labor disputes in cities, counties and districts in California through collective bargaining. A damage award based on a non-statutory common law tort frustrates the purposes of the state legislation.

The issue of the legality of a public employee strike and tort liability presents social and economic matters of great importance to the hundreds of thousands of employees of cities, counties and districts in California, where the imposition of damages can cause a crippling financial

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[5]Technical defenses could be asserted, such as that the settlement agreement constituted a waiver or release, but the practical result is that there are damages to the public employer based on the strike, and without an express release, a cause of action for damages remains as a potential lawsuit.

effect on a union, the union staff employees, and individual employees.[6] A *per se* prohibition resulting in tort liability should not be imposed by the courts, but is within the province of the Legislature only.[7]

D. The Court of Appeal Decision Is Not Compatible With the Trend of Recent Supreme Court Cases on Public Employee Strikes.

In *In re Berry, supra,* the Supreme Court reversed a Superior Court issuance of a broad, all-encompassing injunction against picketing by a union resulting from a public employee strike against a local public agency.

In *Cooper, supra,* the Supreme Court held that a settlement agreement providing wage increases that resulted from a public employee strike was lawful and enforceable under the MMBA.

In *San Diego Teacher Assn., supra,* the Supreme Court held that the Superior Court did not have jurisdiction to enjoin a teachers' strike against a school district as the subject matter and remedies were within the exclusive jurisdiction of the Public Employment Relations Board.

In *El Rancho, supra,* the Supreme Court held that the rule of *San Diego Teachers Assn., supra,* also applied to a

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[6]It is estimated that there are over 1,000,000 public employees in the State of California, and in 1979 there were 79 strikes by public employees against the state and local governments, involving 39,076 employees, resulting in 602,408 idle man-days. In 1980, there were 46 public employee strikes in California, involving 20,045 employees, resulting in 160,474 idle man-days. (*California Public Employee Relations* No. 48, March, 1981.)

[7]The MMBA does not prohibit strikes. However, the Legislature expressly prohibited strikes by fire fighters under Labor Code Section 1962. See *Cooper, supra,* at 912, n. 5.

claim for damages by a school district arising out of a teachers' strike.

In *IBEW v. City of Gridley, supra,* the Supreme Court held that the city, under the MMBA, could not revoke the union's certification as the bargaining representative due to the union's strike against the city.

A consistent, logical and realistic rule of law in order to accommodate a modern common law with the state legislation of the MMBA is that there is no *per se* tort. The Superior Court can enjoin, as a matter of equitable jurisdiction, a public employee strike that threatens the health and safety of the public. However, a tort allowing damages is not in the same category or necessary to safeguard the public interest. Where an injunction is permissible based on health and safety, the contempt powers of the court are formidable in enforcing the court order. Under the Court of Appeal decision, the Superior Court, without any findings on the nature of or reason for the strike, can impose damages, which makes the court a substantial supporter of the employer in the collective bargaining process and severely upsets the collective bargaining process of the MMBA.

E. The Court of Appeal Was in Error in Holding That There Cannot Be a Defense on Whether the District Engaged in Unfair Bargaining and Therefore Violated the Meyers-Milias-Brown Act.

See concurring opinion of Justice Reynoso in *Stationary Engineers v. San Juan Suburban Water District* (1979), 90 Cal.App.3d 796, 801.

F. The Court of Appeal Was in Error in Holding That the Granting of Damages Arising Out of a Public Employee Strike Is Not a Violation of the Constitutional Rights of Free Speech and Association and the Guarantee of Equal Protection of the Law for the Union and Its Members.

The Court of Appeal cites *Pasadena Unified School District, supra,* and *Los Angeles Unified School District v. United Teachers,* 24 Cal.App.3d 142, 144-146 (disapproved in *City and County of San Francisco v. Cooper, supra); City of San Diego v. American Federation of State, etc. Employees* (1970), 8 Cal.App.3d 308), for a summary rejection of the constitutional issues urged by Petitioners. The Supreme Court has not decided such important constitutional questions.

G. The Superior Court Committed Reversible Error in Allowing Excessive Overtime Pay by 24-Hour Assignments.

The District paid overtime to management, executive and professional employees for time spent on a 24-hour basis. The Superior Court did not require the District to follow any reasonable rule on damages or take any reasonable care to minimize losses or mitigate damages. The District arbitrarily assigned such highly paid employees to be stationed at the various district sites on a 24-hour basis, where no work was required or necessary, and paid such employees for the full 24 hours, with overtime after 8 hours, which included overtime for reading, sleeping, recreation, walking around, driving to and from restaurants, and eating meals, etc.

H. The Court of Appeal Was in Error in Allowing Pre-Judgment Interest.

The Superior Court granted pre-judgment interest even though the amount was not certain or capable of calculation and was subject to a judicial determination. The Complaint did not specify the amount of damages until an amendment was filed some three years after the filing of the original Complaint. Throughout the trial, the District claimed additional damages and resisted certain offsets urged by Petitioners. The granting of pre-judgment interest is contrary to the rule that an award of pre-judgment interest must be based on the essential element that there was a certainty of the amount or capability of certainty, and not subject to judicial determination.

III.

ARGUMENT.

A. The Common Law Rule on Public Employee Strikes and Damages Must Require Recognition of a Modern Society With Collective Bargaining in Public Employment Under State Legislation.

In *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960), 54 Cal.2d 684, the Supreme Court stated that "[i]n the absence of legislative authorization public employees in general do not have the right to strike . . ." 54 Cal.2d at 687. This pronouncement — albeit dictum[8] — has been treated by the Courts of Appeal as establishing a California "common law rule" that public employee strikes, absent an authorizing stat-

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[8]The Court in *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen, supra,* found the Los Angeles Metropolitan Transit Authority Act to authorize strikes by employees of that agency.

ute, are *per se* illegal. (See Appendix "A", p. 5. *See also Stationary Engineers v. San Juan Suburban Water Dist.* (1970), 90 Cal.App.3d 796, 801; *Pasadena Unified Sch. Dist. v. Pasadena Fed. of Teachers, supra; City of San Diego v. American Federation of State, etc. Employees, supra; Almond v. County of Sacramento* (1969), 276 Cal.App.2d 32, 35-36.)

This Court should examine this accepted doctrine of the Courts of Appeal and declare that the common law rule is that in the absence of a specific legislative prohibition, public employees are not *per se* violating some undefined and unspecified law when they engage in a strike, and that such a strike can be enjoined only if the public employer demonstrates that the strike presents a clear and present danger to the health and safety of the public.

1. The Supreme Court Can and Has Formulated the Common Law When an Accepted Doctrine is Outdated and Inconsistent With Modern Society.

The Supreme Court has long recognized the necessity to redefine, modify, change, or even abolish, a common law rule "when reason or equity demand it" or when the rule is considered "unjust" in light of the needs of modern society. *Rodriguez v. Bethlehem Steel Corp.* (1974), 12 Cal.3d 382, 394 (Court abrogated common law rule prohibiting a spouse from recovering for loss of consortium and established a new rule allowing a spouse to maintain such a cause of action); *Muskopf v. Corning Hospital District* (1961), 55 Cal.2d 211, 213 (Court abolished common law rule of governmental immunity). See also *Li v. Yellow Cab Co.* (1975), 13 Cal.3d 804 (Court abolished common law rule of contributory negligence and established a new rule of comparative negligence); *Green v. Superior Court* (1974), 10 Cal.3d 616 (Court f

changed common law rule that landlord under no duty to maintain leased dwellings in habitable condition during the term of the lease); *People v. Pierce* (1964), 61 Cal.2d 879 (Court changed common law rule regarding spousal immunity from prosecution for conspiracy); *Malloy v. Thong* (1951), 37 Cal.2d 356 (Court abolished common law rule of tort immunity for charitable institutions).

In *Rodriguez,* the Court enunciated in the clearest terms the Supreme Court's role in insuring the just and rational development of the common law in California:

> "The nature of the common law requires that each time a rule of law is applied, it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice. Whenever an old rule is found unsuited to present conditions or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice." 12 Cal.3d at 394.

See also *Butcher v. Superior Court* (1983), 139 Cal.App.3d 58, 64, where the Court of Appeal extended the new common law rule enunciated in *Rodriguez* to allow unmarried cohabitants to maintain an action for loss of consortium. The Court of Appeal stated:

> "When it is determined that the common law of judge-made law is unjust or out of step with the times, we should have no reluctance to change it. [Citation omitted.] The law is not, nor should it be, static. It must keep pace with changes in our society since it was never intended for the doctrine of *stare decisis* to be cast in iron. [Citation omitted.]"

The rule of the Court of Appeal that public employees do not have any right to strike at any time or in any

situation was judicially created. And, just as the aforementioned common law rules were either discarded or changed because they were "unjust" or "equity demanded it", a common law rule on public employee strikes should be carefully formulated, consistent with the state legislation and the realities of public employment.

2. Public Policy Dictates That There Should Be No Per Se Prohibition Against All Public Employee Strikes as the Rationales Advanced for Prohibiting All Strikes by Public Employees Are No Longer Logically or Legally Supportable.

The last two decades have seen a drastic change in judicial and scholastic attitudes toward the rights of public employees to bargain collectively and to strike in support of their demands. As Hugh B. Jascourt, Labor Relations Editor of the Journal of Law and Education, observed, "The current trend — both intellectual and statutory — is to permit a 'limited' right to strike by public employees, . . ." Jascourt, "Limited Right to Strike Laws — Can they Work When Applied to Public Education? An Overview", 2 J. Law and Educ. 673 (1973). Several states explicitly permit strikes by certain public employees,[9] and other states, through their highest

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[9] *Alaska.* Alaska Stat. Section 23.40.200. (Courts limited to enjoin a strike by employees if the strike "has begun to threaten the health, safety and welfare of the public.") *Hawaii.* Hawaii Rev. Stat. Section 89-12. *Minnesota.* Minn. Stat. Ann. Section 179.64. *Montana.* Mont. Code Ann. Section 39-31-201. (No specific legislative provision granting public employees the right to strike; however, in *State ex rel. Department of Highways v. Public Employees Craft Council* (1974), 165 Mont. 349, 352, 529 P.2d 785, 788, the Court interpreted the legislative declaration authorizing public employees to bargain collectively to include a right to strike.) *Oregon.* Or. Rev. Stat. Section 243.736. (Law permits public employer to seek to enjoin otherwise legal strike only if "a court finds that the strike creates a clear and

courts, implicitly allow public employee strikes.[10] Additionally, an increasing number of commentators and commissions have recommended that public employees be granted the right to strike. As the Court of Appeal in the instant case noted (Appendix "A", p. 5), one such commission, the California Assembly Advisory Council on Public Employee Relations, in its final report of March

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present danger or threat to the health, safety and welfare of the public.") *Pennsylvania.* Pa. Stat. Ann. Title 43, Sec. 1101.1001. (Strikes by public employees are permitted "unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public.") *Vermont.* Vt. Stat. Ann. Title 3, Section 903. (State employees prohibited from striking; however, municipal employees are allowed to strike.) See also 2 A.B.A. Section Labor Rel. L. Committee Reports, State and Local Government Bargaining, 389 (1978), 862 Gov't. Empl. Rel. Rep. (BNA) 17 (May 19, 1980). In 1983, *Illinois* and *Ohio* enacted legislation permitting public employee strikes except for security personnel and essential services. Government Employee Relations Report, Vol. 21, No. 1032, pp. 1955 and 1961 (October 3, 1983).

[10]In *Holland School Dist. v. Holland Educ. Ass'n.* (1968), 380 Mich. 314, 157 N.W.2d 206, the Court declared a teachers' strike illegal, but refused to grant an injunction, stating that "It is basically contrary to public policy . . . to issue injunctions in labor disputes absent a showing of violence, irreparable injury or breach of the peace." *Id.,* at 326, 157 N.W.2d 210. Similarly, in *Timberlane Regional School Dist. v. Timberlane Regional Educ. Ass'n.* (1974), 114 N.H. 245, 317 A.2d 555, the Court held that, "In deciding to withhold an injunction the trial court may properly consider . . . whether recognized methods of settlement have failed, whether negotiations have been conducted in good faith, and whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue." *Id.,* at 251, 317 A.2d at 559. Other cases withholding remedies for allegedly illegal strikes include: *School Comm. of Westerly v. Westerly Teachers Ass'n.* (1973), 111 R.I. 96, 299 A.2d 441; *School Dist. No. 351 of Oneida County v. Oneida Educ. Association* (1977), 98 Idaho 486, 57 P.2d 830; *Local 266, International Brotherhood of Electrical Workers v. Salt River Project Agriculture Improvement and Power District* (1954), 78 Ariz. 30, 275 P.2d 393.

15, 1973, concluded (at p. 24) that, "[s]ubject only to [certain specified] restrictions and limitations . . . public employees should have the right to strike."[11] The issue has been the subject of many writers and experts in the field of public labor relations.[12]

One of the earliest cases of the Court of Appeal on public employee collective bargaining was *Nutter v. City of Santa Monica* (1946), 74 Cal.App.2d 292, which was pre-MMBA and held that Labor Code Section 923 was a legislative grant of authority for collective bargaining in the private sector, but was not applicable to public employees. *City of Los Angeles v. L.A. etc. Council* (1949), 94 Cal.App.2d 36, followed, on the issue of public employee strikes. *City of San Diego v. AFSCME, supra,* following *Almond v. County of Sacramento, supra,* held, that under the common law, a public employee strike was unlawful. Finally, in *Pasadena Unified Sch. Dist.,* the Court held that since a public employee strike is unlawful under the common law, then it follows that there is tort liability for damages. The other Courts of Appeal decisions have restated the same rule as accepted law. Therefore, it is necessary to reexamine the underlying public policy is-

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[11]Much of the current enlightened view regarding public employee strikes owes its genesis to a report made by a Pennsylvania commission in 1968. This commission extensively studied the matter of public sector employee relations and concluded: "[W]here collective bargaining procedures have been exhausted and public health, safety or welfare is not endangered, it is inequitable and unwise to prohibit strikes." Report and Recommendation of the Governor's Commission to Revise the Public Employee Law of Pennsylvania (June 1968), at p. 13, quoted in Jascourt, "Limited Right to Strike Laws . . .", *supra,* 2 J. Law and Educ. 673 at 674-675.

[12]Many of such articles are set forth in Appendix "A", p. 3. See also articles cited in *El Rancho Unified Sch. Dist. v. Nat'l Ass'n., supra,* at p. 965 (Grodin, J., concurring).

sues that formed the rationale or the stated so-called common law rule.

The holding that there is a common law rule that a public employee strike is *per se* illegal continues to be followed by the Courts of Appeal, based primarily on a number of outmoded policy reasons. Those arguments are summarized as follows: (1) sovereignty — the concept that public employee strikes are denial of the authority of government, (2) improper delegation of legislative authority — to permit public employee strikes as part of collective bargaining would give a union unacceptable bargaining power and would therefore distort the legislative process, (3) essentiality — public services are essential and therefore may not be interrupted, and (4) the terms of employment are not subject to bilateral collective bargaining because they are set by the legislative body through unilateral lawmaking.

An examination of these policy arguments reveals that they are essentially not valid or realistic. The first argument — that one cannot strike against the sovereign — has found almost no support in recent years.[13] See *Note,* "Private Damage Actions Against Public Sector Unions for Illegal Strikes," 91 Harv.L.Rev. 1309, 1314-1315 (1978). Commentator Harry T. Edwards[14] has summarized much of the critique of the sovereignty argument as follows:

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[13]*Nutter v. City of Santa Monica, supra,* is an early California case to rely on the sovereignty argument. See also, *City of Manchester v. Manchester Teachers Guild* (1957), 131 A.2d 59, 61 (New Hampshire).

[14]Currently a justice of the United States Court of Appeals for the District of Columbia.

"It is clear, however, that sovereignty is no longer an adequate answer to public sector problems. For one thing, the idea of sovereignty is too vague; it offers little if any guidance as to the conduct of labor relations. The doctrine of sovereign authority historically has rested on the assumption that 'The King can do no wrong'. This notion found favor in early American legal precedent, especially in cases claiming tort liability against governmental units. Recent years, however, have seen the comfortable consensus on this question fade into the uncomfortable realm of reconsideration and debate. The sovereignty theory, as applied to public sector labor relations, thus begs the question.

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Moreover, the application of the strict sovereignty notion — that governmental power can never be opposed by employee organizations — is clearly a vestige from another era, an era of unexpanded government when its proprietary role was not nearly so important . . . With the rapid growth of the government, both in sheer size as well as in terms of assuming services not traditionally associated with the "sovereign", government employees understandably no longer feel constrained by a notion that 'The King can do no wrong'. The distraught cries by public unions of disparate treatment merely reflect the fact that, for all intents and purposes, public employees occupy essentially the same position vis a vis the employer as their private counterparts." Edwards, "The Development Labor Relations Law in the Public Sector", 10 Duq.L.Rev. 357, 359-360 (1972).

In *Anderson Federation of Teachers, Local 519 v. School City of Anderson* (1969), 252 Ind. 558, 568, 251 N.E.2d 15, 20, Chief Justice DeBrueler, dissenting, noted with respect to the sovereignty argument:

> "This is not a rational argument at all but a technique for avoiding dealing with the merits of the issue. This argument indicates a limitation in the thinker not attributable to the subject matter. In the case of a peaceful strike and no major disruption of the community, I find it very easy to think of a strike against the sovereign *and* to justify it. In fact, I find it unthinkable that any sovereign worthy of the name would strive to remain insulated from all pressures to act fairly and decently, without arbitrariness, towards its employees. The conflict of real social forces cannot be solved by the invocation of magical phrases like 'sovereignty'."

In recent years, sovereign immunity in tort law has been judicially abolished in many states. In California, the death knell came in *Muskopf v. Corning Hospital Dist., supra,* where the Supreme Court stated that, "[t]he rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia." 55 Cal.2d at 216. As noted by the Court in *Moskopf,* perpetration of the doctrine of sovereign immunity in tort law led to many inequities, and its application effect many incongruous results. Similarly, the doctrine that prohibits employees of a local government employer the right to strike on the basis that such strikes are a denial of the authority of government is a doctrine that is archaic and inconsistent with modern society. See *School Comm. of Westerly v. Westerly Teachers Ass'n.* (1973), 299 A.2d 441, 449 (Roberts, C.J., dissenting).

The second argument made against public employee strikes is that to permit public employees to engage in such activity would be an improper delegation of legislative authority to set the wages and terms and conditions of public employment. It is argued that the right to strike distorts the democratic political process because a strong public employee union would be able, by collective power, to wrest concessions from government to the detriment of the public welfare.

This argument has already been considered and flatly rejected by the Supreme Court in *Los Angeles Met. Transity Authority v. Brotherhood of Railroad Trainmen, supra,* where the Court concluded:

> "Permitting employees to strike does *not* delegate to them authority to fix their own wages to the exclusion of the employer's discretion. In collective bargaining negotiations, whether or not the employees strike, the employer is free to reject demands if he determines that they are unacceptable . . ." 54 Cal.2d at 693.

Moreover, the argument that the availability of a strike for public employees would give public sector unions unacceptable bargaining power is factually unsupportable. The public's concern over tax increases acts as a natural limit on the demands of public employee unions. As explained by Professor Edwards:

> ". . . [T]here *is* a natural limit to the public sector union's demands. The limit is imposed by the public itself. It is reached when the union's demands are exposed and are outrageous enough to raise public anger to the point where the public is not willing to accede to them." (Emphasis in original.) Edwards, "The Developing Labor Relations Law in the Public Sector", 10 Duq.L.Rev. 357 at 363 (1972).

The result of the strike in the instant case illustrates the fallacy of the argument that, if given the right to strike, a public sector union would wield excessive bargaining power. During the strike, negotiations resumed, and the parties reached an agreement on a new Memorandum of Understanding, the terms of which were the same as the District's last offer prior to commencement of the strike. (See Exhibits 182, 335; R.Tr.: 629, 1258.)[15] Clearly, the strike in the instant case did not cause the District to capitulate to the Union's demands.

A third argument made against permitting public employees to strike is the assertion that governmental services are essential and that there are no alternative sources of such services available to the consumer, and that, therefore, interruption of such services is not acceptable. The clear and most persuasive response is that the essentiality of the services does not depend on whether the employer is public or private. Chief Justice DeBrueler, dissenting, in *Anderson Federation of Teachers, Local 519 v. School City of Anderson, supra,* observed that:

> "There is no difference in impact on the community between a strike by employees of a public utility and employees of a private utility; nor between employees of a municipal bus company and a privately owned bus company; nor between public school teachers and parochial school teachers. The form of ownership and management of the enterprise does not determine the amount of destruction caused by a strike of the employees of that enterprise. In addition, the form of ownership that is actually employed is often a politi-

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[15]Reference to the Reporter's Transcript will be made by "R.Tr." and the page number, and to the Clerk's Transcript by "C.Tr." and the page number.

cal and historical accident, subject to future change by political forces. Services that were once rendered by public enterprise may be contracted out to private enterprise, and then by another administration returned to the public sector." 251 N.E.2d at 21.[16]

No intellectually sound argument can be made that the harm to the public is significantly greater in *every* public employee strike than it is in *any* private sector strike. It is the nature of the service provided that determines the impact of its interruption upon the public, not whether the service is provided publicly or privately. Only if it could be shown that each and every service provided by the public sector is absolutely essential to public h[illegible]

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[16]Recently, the United States Supreme Court, in *United Transportation Union v. Long Island Railroad* (1982), 455 U.S. 678, held that employees of a formerly private railroad recently acquired by a governmental entity retained their right to strike under the Railway Labor Act. The U.S. Supreme Court found that the public acquisition did not change the character of the service provided by the railroad Thus, the public railroad employees continue to enjoy a right to strike notwithstanding their public employment status. This case marks a departure from the U.S. Supreme Court's earlier holding in *United States v. United Mineworkers* (1947), 330 U.S. 258, where the Court held that the United States' seizure of a private coal mine transformed the coal mine operation from a private to a public enterprise. The Court then approved the issuance of an injunction against the striking union, a remedy that would not have been available had the employer been a private enterprise. In *United Transportation Union*, however, the U.S. Supreme Court recognized that the circumstance of public intervention need not necessarily alter the rights of employees. Although the *United Transportation Union* decision rested on the Supremacy Clause of the U.S. Constitution, the Supreme Court implicitly held that the railroad became no more essential after its public acquisition than it was when privately operated. The case thus represents a significant departure from the Court's earlier holding in *United Mineworkers* that a service becomes essential when it comes under government control.

and safety, and further that its interruption would cause more hardship to the public than the interruption caused by any strike in the private sector, could the absolute prohibition against all public employee strikes be logically supported. There simply is no empirical support for such a proposition. The fact is that in many instances, strikes by private employees pose a more serious threat to the public interest than would many of those engaged in by public employees.[17] As stated by Chief Justice Roberts, dissenting, in *Westerly School Comm. v. Westerly Teachers Association, supra:*

> "It is elementary that the services performed by people employed in the private sector are in many instances so essential to the orderly operation of society that the health, safety, and welfare of the community would be substantially endangered were they to strike. It is not difficult to visualize the adverse effect on the public interest of a strike by the employees of a privately operated hospital or of a public utility. On the other hand, it [w]ould be extremely difficult to conjure up such a threat to the public interest arising out of a strike of the employ-

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[17]On December 1, 1968, the employees of privately owned Consolidated Edison, which provides electricity to the City of New York, went on strike, and the stoppage lasted for one week. On December 15, 1968, drivers who worked for privately owned fuel oil delivery companies in New York City also went on strike, causing the Emergency Control Board of the city to declare that the city was in a state of imminent peril. Both of these strikes occurred during an extremely cold period and at a time when a Hong Kong flu epidemic was peaking in the city. The New York City Health Commissioner noted that people might die because of lack of heat. *New York Times,* December 25, 1968, p. 1. Both of these strikes were legal and can be compared with many public employee strikes which have been found not to have caused any serious threat to the health and safety of public.

> ees of a recreation department of a municipality or of the clerical staff of a state agency. In short, it appears to me that to deny all public employees the right to strike because they are employed in the public sector would be arbitrary and unreasonable." 299 A.2d at 448-449.

While the District may claim that strikes by sanitation employees are particularly likely to endanger the public's health and safety, studies have shown this not to be the case. See Kheel, "Strikes in Public Employment", 67 Mich.L.Rev. 931, 941 (1969), and Burton and Krider, "The Role and Consequences of Strikes by Public Employees", 79 Yale L.J. 418, 427-428 (1970). Moreover, the Union is not suggesting that the common law could not allow the Superior Court to enjoin a strike regardless of circumstances. Rather, the Union urges that the common law, under the MMBA, allow public employees to strike unless the public employer is able to demonstrate that the service it provides is essential *and* that imminent harm and danger to the health and safety of the public will result unless the strike is enjoined. This determination would be made by the trial court on a case-by-case basis, taking into account all of the factors attending the particular dispute. Further, enjoining such a strike is not the same as allowing damages to the employer.

Finally, it has been asserted that since it is contrary to public policy to establish terms and conditions of employment for public employees through the bilateral process of collective bargaining, public employee strikes in support of collective bargaining demands likewise violate public policy. This proposition, which found support in

early Courts of Appeal[18] decisions, has since been rejected by the Legislature through the MMBA. See *El Rancho Unified School Dist. v. National Education Ass'n., supra,* at 962-964 (Grodin, J., concurring).

The Legislature has enacted "a comprehensive scheme creating rights of organization in employees of local public agencies and providing for the resolution of labor disputes between such local public entities and recognized employee organizations." *Union of American Physicians and Dentists v. County of Los Angeles* (1983), 144 Cal.App.3d 236, 240. A review of the cases under the MMBA establishes in California for local government employees all the basic ingredients of a collective bargaining system, except the establishment of a state-wide administrative agency.[19] Thus, under the MMBA, bargaining units may be established and a union selected as the exclusive bargaining representative, *Reinbold v. City of Santa Monica* (1976), 63 Cal.App.3d 433; *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1974), 57 Cal.App.3d 9; public employees have the right to organize, select and be represented by a union in their employment relations with the public employer, *Social Workers Union, Local 535 v. Alameda County Welfare Department* (1978),

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[18] *City of San Diego v. American Federation of State etc. Employees, supra; Almond v. County of Sacramento, supra; Newmarker v. Regents of Univ. of Cal.* (1958), 160 Cal.App.2d 640, 646; *City of Los Angeles v. Los Angeles etc. Council, supra;* 46; *Nutter v. City of Santa Monica, supra.*

[19] Even in this area, MMBA provides, under Section 3507, that a public agency may establish a local administrative agency to administer employer-employee relations. See, *e.g., Union of American Physicians and Dentists v. County of Los Angeles, supra; American Federation of State, etc. Employees, Local 119 v. Los Angeles County* (1975), 49 Cal.App.3d 356; *Social Workers Union, Local 535 v. Los Angeles County* (1969), 270 Cal.App.2d 65.

11 Cal.3d 382; public employee unions have the right to bargain collectively with the public employer and establish a bilateral relationship on wages, hours, and terms and conditions of employment, *Vernon Fire Fighters v. City of Vernon* (1980), 107 Cal.App.3d 802; *Los Angeles, etc. v. Superior Court* (1979), 23 Cal.3d 55; *Fire Fighters Union, Local 1186 v. City of Vallejo* (1974), 12 Cal.3d 608; the parties have the right to agree and sign a binding and enforceable collective bargaining agreement, *Glendale Employees Association v. City of Glendale* (1975), 15 Cal.3d 328; and the parties can agree to and enforce binding arbitration provisions contained in a collective bargaining agreement, *Taylor v. Crane* (1979), 24 Cal.3d 442.

Thus, as Justice Grodin observed in *El Rancho Unified School District v. National Education Association, supra,* at 963, the original policy foundation for the common law rule that public employee strikes are illegal "has been substantially undermined, if not obliterated". The Legislature has granted public employees the right to organize and bargain collectively, and therefore, a court-imposed *per se* rule that strikes are illegal with tort liability and with no statutory prohibition is improper. Such a proposition was made clear by Judge J. Skelly Wright in *United Federation of Postal Clerks v. Blount* (D.D.C. 1971), 325 F.Supp. 879, 885 (3-judge Court, concurrence), *aff. Mem.* (1971), 404 U.S. 802, in which he noted:

> "The right to strike seems intimately related to the right to form labor organizations, a right which the majority recognizes as fundamental and which, more importantly, is generally thought to be constitutionally protected under the First Amendment — even for public employees. [Citations omitted.] If the inherent purpose of a labor organization is to bring

> workers' interests to bear on management, the right to strike is, historically and practically, an important means of effectuating that purpose. A union that never strikes, or which can make no credible threat to strike, may wither away in ineffectiveness."[20]

Petitioners submit that the so-called "policy arguments" used by the Courts of Appeal to formulate the common law are no longer logically or legally supportable and, as the Supreme Court stated: "Whenever [a common law] rule is found unsuited or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice." *Rodriguez v. Bethlehem Steel, supra,* at 394. A common law permitting public employees to strike would be in harmony with present conditions, meet the demands of justice, result in more meaningful negotiations between public employers and unions, and reduce the number of public employee strikes.

3. Permitting Public Employees a Right to Strike Would Result in More Meaningful Negotiations Between Public Employers and Public Employee Unions.

Strikes by public employees are a reality which cannot be ignored. Although the reasons why public employees strike are varied, there can be no question that many public employee strikes are caused in large part by the fact that without the right to strike or a credible threat to

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[20]See also *Timberlane Regional School District v. Timberlane Regional Education Association, supra,* 317 A.2d at 557 ("Fundamental to collective bargaining, the right to strike is as fundamental to public sector unions as it is to unions in the private sector. . . ."); *Bayonne Textile Corp. v. American Federation of Silk Workers* (N.J. 1934), 172 A. 151, 154 ("The right to organize and bargain collectively connotes the right to strike . . .").

strike, public employees have no negotiating strength. It is basic that a public employer, confident that its employees cannot strike, fails to respond in good faith to union proposals. This, in turn, produces frustrations which exacerbate labor-management conflicts and provoke strikes. See *Stationary Engineers v. San Juan Suburban Water Dist.* (1979), 90 Cal.App.3d 796, where the Court held that a public employee strike was illegal even though the trial court found the employer guilty of bad faith bargaining. See also Comment, "California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes", 11 San Diego L.Rev. 473, 478 (1974).

In *Timberlane Regional Schl. Dist. v. Timberlane Regional Educ. Ass'n., supra,* 317 A.2d at 557, the New Hampshire Supreme Court stated:

> "A credible strike threat equalizes the parties' bargaining positions so that collective bargaining, as the bilateral determination of an agreement, can operate effectively. Without the right to strike to back up their demands, teachers and other public employees will continue to be at a disadvantage in negotiations. In fact, in the public sector, the denial of the right to strike has the effect of heavily weighing the collective bargaining process in favor of government."

The Supreme Court of Idaho similarly observed, in *School District No. 351, Oneida County v. Oneida Education Association* (1977), 98 Idaho 486, 490, 567 P.2d 830, 834:

> "[I]n the public sector the denial of the right to strike has the effect of weighing the scales heavily in favor of the government during the collective bargaining process."

Numerous commentators who have studied this issue have concluded that a *per se* prohibition against public employee strikes is unwise and counterproductive, and have argued that permitting public employees to strike would result in more meaningful negotiations between the parties and provide a greater strike deterrent than laws that prohibit strikes. See Rosenberg, "Teacher Strikes: A Proposed Solution", 16 Urb. L. Annual 331, 354 (1979), ("Without the right to strike, the likelihood of impasses in negotiations increases. * * * When the union is secure and legally protected in its right to strike, the employer—aware of his own power to influence the strike decision—can be expected to exercise great sensitivity toward the bargaining process."); Kanes, "The Limited Right to Strike: Experience in Pennsylvania", 31 N.Y. Univ. Conf. on Labor 307, 309 (1978), ("[T]he limited right to strike . . . helps make collective bargaining work by bringing a sense of reality to the process. The right to strike is a two-edged sword and it can serve as a deterrent to unrealistic demands."); Bilik, "Toward Public Sector Equality, Extending the Strike Privilege", 21 Lab.L.J. 338, 347 (1978), ("[N]o strike laws . . . tend to make the employer dull to the danger signals, thus enhancing the likelihood of a bargaining breakdown."). See also, Edwards, "The Developing Labor Relations Law in the Public Sector", 10 Duq.L.Rev. 357 (1972); Burton & Krider, "The Role and Consequences of Strikes by Public Employees", 79 Yale L.J. 418 (1970); and Kheel, "Strikes in Public Employment", 67 Mich.L.Rev. 931, 940-942 (1969).

4. The Appropriate Standard Should Be That Public Employees May Strike so Long as Their Activity Does Not Present a Clear and Present Danger to the Health and Safety of the Public.

Petitioners urge that the common law be formulated to allow public employees to strike, in the absence of a specific legislative prohibition,[21] or unless the public employer is able to demonstrate that the service it provides is essential to the community and that imminent harm to the public will result unless the strike is enjoined.[22] Additionally, the public employer must come before the court with clean hands, in the sense of having attempted to resolve the dispute in good faith and not having committed any acts in violation of the MMBA.

Under such a common law, a public employee strike could be enjoined only when the public employer is able to convince the trial court that a clear and present danger to the health and safety of the public exists. A requirement that the public employer demonstrate irreparable harm is supported by several cases. See *Holland Schl. Dist. v. Holland Educ. Ass'n., supra,* 157 N.W.2d at 210; *Timberlane Regional Schl. Dist. v. Timberlane Regional*

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[21]Labor Code Section 1962 specifically prohibits fire fighters from striking. This is the only classification of public employees that the Legislature has specifically prohibited from striking. Also see *Cooper, supra,* at 912, fn. 5. Section 3509 of the MMBA, cannot be interpreted as a legislative prohibition of a public employee srike. See *El Rancho, supra* at p. 958 fn's. 17 and 18 and *San Diego Teachers, supra,* at p. 13 holding that Section 3549 of EERA excluding Labor Code Section 923 does not prohibit strikes. The language of MMBA Section 3509 and EERA Section 3549 are substantially identical.

[22]Petitioners are not suggesting that the Supreme Court modify in any way the traditional power of the trial courts to issue injunctions and temporary restraining orders regarding the conduct of picket lines. See C.C.P. Section 527.3

Educ. Ass'n., supra, 317 A.2d at 559. If the strike is not effective or alternative services are available, then the requisite "irreparable harm" is not present. See *City of Buffalo v. Magan* (1975), 370 N.Y.S.2d 771, where an injunction was refused as to striking fire fighters because the union's strike was not effective in that it did not interrupt services.

In the instant case, under this standard, there was no irreparable harm. As the District has stated on several occasions (see, *e.g.,* Resp. Br. to Court of Appeal, p. 5; R.Tr. 1252:18 and 1258:5), the strike was not effective since management, supervisors and other non-striking employees were able to operate the District's facilities.

The rule proposed allows the trial court to consider whether the public employer has bargained in good faith and therefore comes into court with "clean hands". In the instant case, the Court of Appeal adopted the reasoning of *Stationary Engineers v. San Juan Suburban Water District, supra,* which held that a public employee strike is illegal regardless of whether the employer bargains in bad faith. Numerous courts in other states have applied traditional equity principles to require the public employer to come to court with clean hands. See *Holland Schl. Dist. v. Holland Educ. Ass'n., supra,* 157 N.W.2d at 211 (refusal of government to bargain in good faith would be a factor of importance in the determination of whether or not to issue an injunction). See also *Mastro Plastics Corp. v. Labor Board* (1956), 350 U.S. 270 (employees who engage in strike because of employer's unfair labor practice entitled to return to work even where they have been permanently replaced).

B. A Common Law Liability for Damages Based on a Tort Arising Out of a Public Employee Strike Is Not Proper in the Absence of a Specific Legislative Enactment.

Although there has been a series of cases by the Courts of Appeal that have held that a public employee strike is contrary to public policy and under the California common law and subject to injunctive relief, the only case in California on the issue of damages is *Pasadena Unified School District v. Pasadena Federation of Teachers, supra*. Pasadena Unified School District held that there was tort liability essentially and first of all on the basis that the union, by striking, was inducing a breach of contract between the individual teacher and the school district. However, the Court of Appeal held, under a separate theory, that there was liability for damages of a "theory of direct liability for harm resulting from unlawful acts." 72 Cal.App.3d at 111. However, *Pasadena Unified School District* did not decide the issue of damages in relationship to the MMBA, a comprehensive state-wide collective bargaining statute.[23] *Pasadena* held there was liability as

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[23]The *Pasadena* case involved a school district that was covered by the Winton Act. Prior to the Educational Employment Relations Act (Government Code Sections 3540, *et seq.*), labor relations between the school districts and teachers were covered by the Winton Act, Education Code 1959, Section 13080. The Winton Act was repeatedly interpreted, unlike the MMBA, as *not* providing a collective bargaining system for teachers. For example, the courts held that teachers were not to be represented by an exclusive bargaining agent but by a negotiating council or certificated employees council; the school district could not sign a collective bargaining agreement with a union; bargaining units could not be established; and decisions on wages and conditions of employment were to be made unilaterally by the school district after meeting and conferring with a council representing all the teachers and their organizations. *California Fed. of Teachers, AFL-CIO v. Oxnard Elementary Schools* (1969), 272

a tort solely on the basis that the law was presumed to be that the union did not have the right to strike. The basis under 4 Restatement of Torts, Section 876, page 435, was that there was a breach of duty if public employees strike against their employer, thereby constituting an unlawful act. Therefore, if a strike is not *per se* unlawful, then the rationale of *Pasadena* collapses, and there is no basis for a *per se* tort liability in damages.

Tort liability for damages in labor relations in the public sector is totally inconsistent with the results of *City and County of San Francisco v. Cooper, supra,* where the Supreme Court held that the Memorandum of Understanding that was negotiated between the union and the City and County was enforceable, even though the agreement resulted from a public employee strike under the MMBA. The measure of damages to the public employer was clearly the amount of money that the employer was forced to pay due to the economic action asserted by the public employees and the union. In the absence of an indemnification, release or waiver, the public employer, under *Pasadena,* would have a cause of action for damages for the amount of salaries paid as a result of the settlement and the agreement resulting from the strike. A tort liability for damages is squarely in conflict with the

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Cal.App.2d 514; *Berkeley Teachers Assn. v. Berkeley Fed. of Teachers* (1967), 254 Cal.App.2d 660; *West Valley Federation of Teachers, Local 1953, AFL-CIO v. Campbell Union High School District* (1972), 24 Cal.App.3d 297; *San Juan Teachers Assn. v. San Juan Unified School District,* (1974), 44 Cal.App.3d 232; *Grasko v. L. A. City Board of Education* (1973), 31 Cal.App.3d 290 (disapproved in *Cooper, supra,* on legality of the settlement). In *Cooper,* the Supreme Court held that a bilateral agreement caused by a strike was lawful under the MMBA. However, a collective bargaining agreement was beyond the authority of the school district under the Winton Act. The unilateral resolution adopted by the school district, although caused by a strike, was lawful.

practical results of *Cooper.*[24] To allow enforcement of a strike settlement agreement and still allow damages as a tort results in the court imposing sanctions and is punitive in nature.

The Supreme Court, in *Cooper,* commented on sanctions that have the effect of prolonging a labor dispute rather than encouraging settlement of the issue between the parties, and stated:

> "The question as to what sanctions should appropiately be imposed on public employees who engage in illegal strike activity is a complex one which, in itself, raises significant issues of public policy. [Footnote omitted.] In the past, several states have attempted to deter public employee strikes by imposing mandatory, draconian statutory sanctions on striking employees; experience has all too frequently demonstrated, however, that such harsh, automatic sanctions do not prevent strikes but instead are counterproductive, exacerbating employer-employee friction and prolonging work stoppages. [Footnote omitted.] As a consequence, recent advisory reports prepared by labor relations experts in a number of jurisdictions have uniformly recommended the abandonment of such 'automatic' sanctions and have urged the adoption of a variety of discretionary sanctions which provide the public employer a measure of flexibility necessary to meet varying negotiating situations. (See Smith, *State and Local Advisory Reports on Public Employee Labor Relations Legisla-*

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[24] *Cooper* may be explained by the holding that the courts will not go behind the legislative act and review the motives of a legislative body. However, such a rationale would totally ignore the economic realities of a settlement agreement due to a public employee strike.

tion: A Comparative Analysis (1969), 67 Mich.L.Rev. 891, 910-914.)" 13 Cal.3d at 917.

The Supreme Court further cited with approval, in footnote 9 at page 917, the commentator who declared that "the imposition of sanctions may be counterproductive, . . ." Further, the Supreme Court stated that, "[t]o date, the California Legislature has declined to prescribe any specific sanctions for public employee strikes." (p. 918.)

A court-imposed common law liability for damages in the absence of legislation and in the face of the MMBA would support a ". . . mandatory, draconian sanction . . ." in a public employee strike that the Supreme Court in *Cooper* specifically noted was counterproductive. If such "counterproductive" sanctions for damages are to be imposed at all, it must be done by the Legislature and not by the courts.

The public employer has the means to economically counteract a strike. The public employer, under the MMBA, has the right to replace striking employees in the same manner as the employer can replace strikers in the private sector. *NLRB v. Mackay Radio and Telegraph Co.* (1938), 304 U.S. 333.

Under a collective bargaining process, the public employer has the right and authority to continue operations by hiring replacements or using supervisory and management employees, as the District did in this case. Further, if the strike creates a substantial and irreparable danger to health and safety of the public, the employer can seek an equitable order. In such a situation, the Superior Court can make a determination upon a showing by the public employer that there is a danger to the health and safety of the public, and issue appropriate relief.

Allowing damages, in addition to prolonging the labor dispute and the strike, places the courts on the side of the public employer, which seriously disturbs the balance of the collective bargaining scheme under the MMBA. A public employee strike against a public employer is an economic method of obtaining a fair and equitable agreement. Under the MMBA, the parties themselves must resolve the dispute without interference by a court. A potential damage liability against the union, its staff and the employees means that the court has placed the weight of its authority on one side of the bargaining table.

As a matter of policy under the MMBA, a claim for damages can only increase the hostility and prevent a quicker resolution of the problems that originally caused the strike. A powerful union with strong resources or a group of employees with a strong will to continue striking will continue to strike until the public employer agrees, as part of the settlement, to give a release or a waiver as to any damages. A weak union or employees who are anxious to return to work will return to work facing a damage suit by the public agency. In either situation, the balance between the employees, the union and the public employer is seriously disrupted. If the public policy of the state is to obtain resolutions of labor disputes, then a cause of action of damages can only prolong a strike, given the resources of the union and the will of the employees to continue the strike until the public employer agrees to forgo any claim for damages as part of an overall settlement. The strike is then over the issue of a release or waiver and may be more difficult to settle, and is therefore counterproductive. See *Gridley, supra,* at 202, fn. 11.

In *City of Fairmont v. RWDSU* (1980), 283 S.E.2d 589, the West Virginia Supreme Court was faced with this issue as a matter of first impression. The West Virginia

court carefully reviewed the issue as to whether there is a common law right to damages. The Court, after citing *Lamphere Schools v. Lamphere Federation of Teachers* (1977), 400 Mich. 104, 252 N.W.2d 1818, where the Michigan Supreme Court held there was no common law right to damages, concluded that the West Virginia common law did not allow damages for a public employee strike. The Court held that in order to hold that there was a common law action for damages, the Court would have to revert to an outmoded and disregarded theory of conspiracy that was developed in England under the common law that working persons did not have the right to engage in concerted and collective actions to further their needs regarding wages and working conditions within the framework of a labor union. The Court held that such a common law concept of conspiracy was never adopted in the United States under the common law, and stated:

> "Thus, while some constitutional protection is extended under the First Amendment to public employees to organize, speak freely and petition, it is clear that a public employer is not required to recognize or bargain with a public employee association or union in the absence of a statutory requirement. These decisions, however, do not resolve the question presented in this case. Oddly enough ther are few decisions that address the precise issue before us, whether a common law cause of action exists for damages arising from a peaceful work stoppage against the employer by public employees. In the leading case of *Lamphere Schools v. Lamphere Federation of Teachers,* 400 Mich. 104, 252 N.W.2d 818, 95 LRRM 2279 (1977), the Supreme Court of Michigan found no common law right and declined to create a

common law remedy for damages against a teacher's union for a peaceful work stopped:

> "The proposed remedies in tort, which the School District asserts, in the case at bar, are heretofore unknown to the Michigan common law. Although couching its cause in such familiar tort terms as 'causing a breach of a common law and statutory duty', 'intentional interference with individual contractual relationships', and 'civil conspiracy', the School District attempts to recover monetary damages from teacher federations for conduct not presently actionable, to wit: the withholding of services through peaceful concerted action of public employees. [Footnote omitted.]"

The West Virginia Supreme Court concluded that there was no common law in the State of West Virginia that provided a remedy for damages concerning a peaceful strike by public employees, and held:

> "We have not been cited any case where a court has held that a peaceful strike by public employees under the conditions existing in this case gives rise to a damage action. The assertion that the strike is 'illegal' only serves to confuse the issue. The term 'illegal' in the present case is much like the term 'unfair' which concerned this Court in the *Ohio Valley Advertising* case, *supra.* Its meaning must be derived from the context in which it is used. Here we consider the term 'illegal' against the narrow band of common law labor principles where damages are sought for a peaceful strike. We conclude that where public employees who have no employment contracts with their employer, engage in a work stoppage which is peaceful and directed only against the employer with no attempt to interfere with his customers or bar in-

gress to other employees there is no common law right to damages. In this context, the work stoppage is not 'illegal' in the sense that it gives rise to a common law action for damages. We, also, adopt the view of the Michigan Supreme Court in *Lamphere* and decline to judicially extend under our common law powers a remedy for damages. See *Morningstar v. Black & Decker Manufacturing Co.*, ____ W. Va. ____, 253 S.E.2d 666 (1979).

In so declining, we note that in most other states the legislature has made an effort to make some statutory accommodations to the labor relation problems that exist in the public sector. Indeed, it was the initial inability of the courts to judicially resolve the competing interests of private employees and private employers that led to federal legislation in the labor law field. Most if not all commentators in the labor law area agree that the complex issues in this field are ill suited to any comprehensive judicial situation." (Footnotes omitted.)

The Court, in *City of Fairmont,* distinguished *Pasadena Unified School District* on the basis that the decision was predicated on the existence of written employment contracts between the teachers and the school district and that the teachers had engaged in a work stoppage during the school year while they were under contract.

In *Lamphere Schools v. Federation of Teachers, supra,* the Michigan Supreme Court discussed this problem in the context of public policy and the common law of the State of Michigan, and stated:

"Plaintiff School District correctly relies on the *Detroit* case for the proposition that strikes by public employees are unlawful in common law. However, that case falls far short of creating the classic 'duty',

> 'breach of duty', and therefore 'monetary damages', the triad of traditional tort law. The *Detroit* case stands for the limited proposition that strikes by public employees are against public policy and *are therefore subject to injunction.* There is no precedent establishing a common law tort duty owed by the Federation or its teachers to the School Board regarding peaceful strike activities."

Proceeding on to the policy questions under the common law, the Michigan Supreme Court further stated:

> "Furthermore, the ultimate legislative goal is to achieve a prompt, fair resolution of disputes while avoiding the disruption of the educational process. To recognize alternative tort remedies would result in a substantial negative impact upon such purposes. It would encourage the teachers and School Board inaction. Eventual settlements could be prolonged pending the resolution of multiple tort claims and counterclaims. The inevitable result would be to create labor law log jams in our courts, and, at the same time, to exacerbate labor management disputes."

The Supreme Court, in *El Rancho Unified School District,* cited *Lamphere Schools v. Lamphere Federation of Teachers, supra,* and quoted with approval the Michigan Supreme Court's statement that allowing tort remedies for damages could have a substantial negative impact upon the collective bargaining objectives of the state law.

A damage award as a remedy or a sanction under the MMBA should only be imposed, if at all, by the Legislature. The fact that the Legislature has remained silent on this subject does not automatically require the courts to provide a remedy or sanctions that properly belong to the Legislature. The United States Supreme Court has held that where a matter involved interstate commerce, and

the National Labor Relations Board had not taken jurisdiction, the issue of preemption still applied and the state court could not fill the vacuum in the absence of specific congressional authorization. *San Diego Building Trades Council v. Garmon* (1957), 353 U.S. 26; *Guss v. Utah Labor Relations Board* (1957), 353 U.S. 1; *Meat Cutters v. Fairlawn Meats, Inc.* (1957), 353 U.S. 20. This issue is closely related to the preemption doctrine, and since the MMBA is silent on this issue, then this Court should not create a common law tort as a substitute to fill a legislative vacuum.[25]

In *IBEW v. City of Gridley, supra,* the Supreme Court, under the MMBA, refused to allow the City the remedy of revoking the union certification due to on a strike in the absence of legislative authority. The Supreme Court stated, "If the Legislature believes an additional remedy is warranted, and a revocation of the union's recognized status is likely to prove more beneficial than harmful (see footnote 10, p. 202), it can, of course, expressly authorize such revocation." In the same manner, if the Legislature believes that a tort remedy is appropriate and necessary

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[25]The State Legislature has repeatedly refused to enact proposed legislation that would prohibit public employee strikes in California. In the 1981-1982 session alone, the following bills were rejected: SB 1551 (Sen. Speraw), public schools; AB 1642 (Assemblyman LaFollette), public schools; AB 670 (Assemblypersons Filante, Wyman, Bergeson, Banker, Dennis Brown, Frazee, Moorhead and Nolan, and Senators Doolittle, Johnson and Speraw), all public agencies; AB 1662 (Sebastiani), public schools, State of California and local emergency agencies; AB 1847 (Lewis), local public agencies, public schools, State of California and transit districts. In the 1983-1984 session: AB 1376 (La Follette), Southern California Rapid Transit District; AB 187 (Young) and SB 778 (Dills), peace officers of local public agencies, also providing for third party binding arbitration of interests disputes.

within the scheme of the MMBA, then it is up to the Legislature to provide such a remedy.

C. The Court of Appeal Was in Error in Holding That the Union Could Not Assert a Defense That the District Engaged in Unfair Labor Practices Under the MMBA.

The Court of Appeal, relying on *Stationary Engineers v. San Juan Suburban Water District, supra*, held that a public employee strike was illegal and allowed a common law tort for damages regardless of whether the public employer had violated the MMBA or not. (Appendix "A", p. 8.) *Stationary Engineers* did so hold. However, the concurring opinion stated that the law does allow such a defense.

This case presents a complete record after a lengthy trial on the negotiations between the District and the Union. The blue collar employees were faced in the 1974 negotiations with the District demand to reduce a substantial number of employees from a 48 hour week to a 40 hour week, thereby resulting in a substantial net loss of take-home pay. After a short strike the matter was resolved, and there was a reduction to 44 hours rather than to 40 hours, with time and one half for overtime. In 1975, there was a further reduction, which resulted in an agreement where the substantial number of employees were reclassified and placed on a special rate.[26] In the 1976 negotiations, the employees were faced with further loss of take-home pay. Further, the employees in the landfill (approximately 40% of the unit) did not receive any rest periods or any time for changes and shower time during

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[26]Such rate is referred to as the "Y" rate, where the employee's salary is fixed at a higher rate than the classification salary in the agreement.

the work day, whereas the other employees did receive such time, as well as a 15 minute rest break in the morning and in the afternoon. The District proposed to remove the provisions of the existing Agreement for binding arbitration on terminations and suspensions. On June 23, 1976, the District made a final offer of a general 4.5% increase and a 2.5% increase for Y rated employees, with no change in shower, change and rest time for the landfill employees. On July 1, the District made a new offer, consisting of a 5.1% increase and a 2.5% increase to the Y rated employees, with a total of 40 hours in the year of overtime to the employees who had their overtime eliminated. However, the District negotiator made this offer only on the condition that the employee negotiating committee recommend the settlement to the membership, and that if the offer was not recommended, then the only offer on the table was the June 23 offer of a 4.5% increase, unless the treatment plant operators gave up their change and shower time, and in such event the offer would be increased to 5.1%. The employee negotiating committee, consisting of rank and file employees, refused to make such a recommendation, and therefore presented the June 23 proposal to the membership, which rejected it by a secret ballot vote of 280 to 70, and the employees voted to strike. (R.Tr. Vol. 3, pp. 565-595.)

The District's proposal of June 23 was the only proposal that could be presented to the membership by virtue of the District's position that the committee had to make a recommendation in favor of the second proposal of July 1. The result was that a number of the Y rated employees whose overtime hours would be reduced would end up with virtually no salary increase for the year, and to aggravate the matter, many of such employees had received no salary increase or a minimal increase in 1975. (Exh. 354; see also Memoranda of Understanding, Exhs.

355, 356 and 357.) In 1975, a number of such employees actually took a substantial decrease in take-home pay, and by the District's proposal prior to the strike, many of such employees received as little as a $10.00 a month increase, and those who were Y rated and also on a 48 hour week would have received a loss in pay based on a 2.5% offer.[27]

In *Stationary Engineers*, the Superior Court made a finding that the public employer had in effect violated the MMBA by not negotiating in good faith with the union, but nevertheless held that the public employee strike was illegal and the District had a right to discharge the employees. The Court of Appeal held any employer violations of the MMBA did not affect the legality of the strike, and further that the findings of the Superior Court were not supported by the evidence. Justice Reynoso, concurring, would apply the rule under the federal law that a strike that may be illegal under certain circumstances is legal and justified where the public employer has committed unfair labor practices. However, Justice Reynoso concluded, upon reading the record, that the seriousness of the employer's misconduct did not out-

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[27]For example, a Sewer-Maintenance (probably one of the most difficult jobs due to the inherent nature of the work) received $1,123.00 per month in 1973, $1,163.00 per month in 1974, and a drop to $1,113.00 per month in 1975. In 1976, based on a 5.1% increase, he would receive $1,128.00 per month (amounting to a $15.00 per month increase after losing $50.00 per month in 1975). For the period 1973-1976, he gained 1% in salary increases. The Court can take judicial notice that this was a period of substantial inflationary fluctuations in our economy. The question is, under the common law under such adverse conditions, does the Sewer Maintenance Worker, as a public employee, have to accept the District's final offer, which he considers to be unfair and unjust, or terminate his employment, or can he engage in a peaceful strike to gain further salary without subjecting himself, his assets, and his union to substantial damages?

weigh the employees' action in engaging in a work stoppage.

Stationary Engineers did not engage in an analysis of the MMBA as a comprehensive state-mandated collective bargaining process for local governments. Under the federal law an unlawful strike by a union under a no-strike clause of an agreement can be justified and lawful due to an employer's unfair labor practices. *Mastro Plastics Corp. v. Labor Board, supra.* The California courts have consistently looked to the federal law for guidance in interpreting and applying the MMBA. *Firefighters Union Local 1186 v. City of Vallejo* (1974), 12 Cal.3d 608.

Under the EERA, the courts have upheld a PERB decision that conditioned the union's strike action on the public employer's good faith negotiations as required by the law. *Modesto City Schools v. Modesto Teachers Assn.* (1982), 136 Cal.App.3d 881.

D. An Absolute Prohibition of the Right to Strike Under All Circumstances Based on a *Per Se* Common Law Rule Is Contrary to the California Constitution on Free Speech, Association, and Equal Protection of the Law.

Although California Constitutional rights have been rejected by the Court of Appeal, including *Pasadena Unified School District, supra,* and the instant case (Appendix "A", p. 7), the Supreme Court has never reviewed the issue as to the protection of constitutional rights to a public employee strike.

A distinction must be made between the right of the courts to exercise their equity jurisdiction when a strike is causing a danger to the health and safety of the public, and a *per se* unlawful rule that prohibits all public employee strikes and allows damages. It is not in question,

nor are Petitioners urging, that there is a constitutional infringement when a court exercises equitable authority to prevent a clear and present danger upon a proper showing that there is a danger to the health and safety of the community. However, in the absence of such a showing, a *per se* prohibition on public employees associating with other employees and collectively withdrawing their services and peacefully picketing to publicize and notify the public and other employees is an infringement on the right of public employees and the union to exercise their constitutional rights. California Constitution, Article I, Sections 1, 2, 3 and 7.

Employees in the private sector, exclusively under California law, have long been held to have the right to engage in a peaceful withholding of services, collective action, and the right to picket.[28] *McKay v. Retail Auto S. L. Union No. 1067* (1940), 16 Cal.3d 311, held that to withhold services on a collective basis and assert economic pressure upon the employer was a right guaranteed

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[28]There is no showing that the strike was other than peaceful. The Complaint and the Declarations requesting a Temporary Restraining Order and the Preliminary Injunction showed that there were pickets and that the Union was engaged in a strike, but nowhere was it alleged that there was any violence or blocking of ingress or egress, or that in any manner the strike was other than peaceful. (C. Tr.: pp. 1, 13, 21, 32, 44, 55; see also Order to Show Cause Re Contempt, C. Tr.: pp. 1, 87.) The testimony of District witnesses clearly established that the employees, including management employees, came and went from the various facilities without any interference from the strikers, and that at a number of locations there was no picketing. The court of Appeal implied that the strike was other than totally peaceful. (Appendix "A", p. 7, n. 2.) However, a few isolated incidents were never proven to have been the responsibility of the Union. The District's pleadings and claim for damages have, without exception, proceeded on the theory that the peaceful strike itself was unlawful and allowed damages.

under the Constitution as a matter of free speech and assemblage. See also, *Steiner v. Long Beach Local No. 128* (1942), 19 Cal.2d 672.

The right to withhold services and engage in peaceful picketing as a collective matter constitutes a fundamental right, and cannot be waived by the employees by virtue of public employment. *Vogel v. County of Los Angeles* (1967), 68 Cal.2d 18, 22. See also *Keyishian v. Board of Regents* (1966), 385 U.S. 589, and *Garrity v. New Jersey* (1966), 385 U.S. 493.

In *Bagley v. Washington Township Hospital District* (1966), 65 Cal.2d 499, 507, the Supreme Court held that a government employer could not restrict the political activities of the employees without conflicting with the employees' constitutional rights, and stated:

> "The public employee surely enjoys the status of a person protected by constitutional right. Public employment does not deprive him of constitutional protection. In the absence of an imperative necessity to protect the public from irresponsible activity of so serious a nature that it would disrupt the public welfare, such protections are not subject to distraction."

The Supreme Court, in *Committee to Defend Reproductive Rights v. Myers* (1981), 29 Cal.3d 252, applied *Bagley* to invalidate statutory provisions that limited Medi-Cal funding for abortions as violative of California's standards of equal protection. The *Bagley* and *Myers* cases are applicable to the constitutional right of a public employee to withhold services. A *per se* rule prohibiting such speech and assembly is unconstitutional where the public employer does not have to show that the strike is a clear and present danger to the public. See *Schwartz-Torrance Ins.*

Corp. v. Bakery & Confectionery Workers, 51 Cal.2d 766 (1964).

Public employment under the MMBA covers a wide spectrum of occupations and services, ranging from obviously essential services that affect the public's health and safety, such as police and fire, to the other extreme, involving employees working at golf courses, libraries, welfare offices, etc. It cannot be seriously contended that all of these services, without exception, affect the health and safety of the public so as to justify a *per se* rule that restricts the constitutional rights of public employees. The *per se* prohibition rule that has been applied by the Court of Appeal is overly broad, and restricts the right of public employees to engage in peaceful association and speech. In *L. A. Teachers Union v. L. A. City Board of Education* (1969), 71 Cal.2d 551, the Supreme Court held:

> "When the effect of exercise of First Amendment rights related to speech is impaired by governmental regulation, the Court must weigh the extent of the impairment against both the importance of the governmental interest and the substantiality of the threat which the forbidden speech or related activity poses to their interest. The more substantial the infringement of the First Amendment right is, the more compelling the governmental interest and the more ominous the threat to their interest must be. The danger of justifying restrictions of prohibition must be one which rises far above public inconvenience, annoyance or unrest."

In *McKay,* the Supreme Court, regarding private sector strikes, stated:

> "It must be taken as settled in this state, that workmen may associate together and exert various forms of economic pressure upon employers, pro-

> vided they act peaceably and honestly. The conventional means of exerting this economic pressure which have been held lawful are the strike . . . the boycott, both primary and secondary . . . and the picket."

In *Steiner v. Long Beach Local No. 128, supra,* the Supreme Court stated:

> "Workmen may lawfully combine to exert various forms of economic pressure upon an employer . . . this right is guaranteed by the federal constitution as an incident of freedom of speech, press and assemblage."

Under the principle of equal protection of the law, there is not a sufficiently strong state interest to justify the consitutional infringements of prohibiting a strike and allowing damages, where in the private sector, employees of a public utility, where a strike would have a serious and damaging effect on the public safety, have the right to engage in a strike and picketing.

The Supreme Court has long held that constitutional protections are provided to public employees in various forms of their political and economic activities. See *Skelly v. State Personnel Board* (1975), 15 Cal.3d 194; *Fort v. Civil Service Commission* (1964), 61 Cal.2d 331; *Kinnear v. City etc. of San Francisco* (1965), 61 Cal.2d 341; *Bagley v. Washington Township Hospital District, supra.*

The Supreme Court has had a long history of defining and providing free speech guarantees in labor disputes, and has never indicated that there is a distinction on a fundamental constitutional right as to whether an employee is employed by a private or a public employer, particularly where services may be substantially compara-

ble. See *In re Blaney, supra; In re Porterfield* (1946), 28 Cal.2d 91.

The constitutional issues as related to a public employee strike were observed by Judge Skelly-Wright in his concurring opinion in *United Federation of Postal Clerks v. Blount, supra,* where he states: "A union that never strikes or which can make no credible threat to strike may wither away in ineffectiveness."[29]

The California Supreme Court has frequently and without hesitation extended consitutional rights to California citizens under the California Constitution, although such rights are held not protected by the Federal Constitution. In *Robbins v. Pruneyard Shopping Center* (1979), 23 Cal.3d 899, the Supreme Court stated:

> "The duty of this court is to help determine what liberty of speech means in California. Federal principles are relevant, but not conclusive so long as federal rights are protected."

In *People v. Brisendine* (1975), 13 Cal.3d 528, the Supreme Court stated that "The California Constitution is, and always has been, a doctrine of independent force." See also *People v. Teresinski* (1982), 30 Cal.3d 822; *People v. Chavez* (1980), 26 Cal.3d 334; *Committee to Defend Reproductive Rights v. Myers, supra; City of Santa Barbara v. Adamson* (1980), 27 Cal.3d 123; *People v. Pettengill* (1978), 21 Cal.3d 231; *Parrish v. Civil Service Commission*

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[29]See also Chief Justice Roberts' dissent in *Schl. Comm. of Westerly v. Westerly Teachers Association, supra,* 299 A.2d at 449, where he states: "The collective bargaining process, if it does not include a constitutional protected right to strike, would be little more than an exercise in sterile ritualism." Further, see Theodore W. Kheel, "Resolving Deadlocks without Banning Strikes," Monthly Labor Review (July 1969), pp. 62-63.

(1967), 66 Cal.2d 260; and *Wirta v. Alameda Contra Costa Transit District* (1967), 68 Cal.2d 51.

California has a long tradition of protecting the personal liberties and constitutional rights of its citizens. As the concurring opinion in *Committee to Defend Reproductive Rights, supra,* at pp. 293-294, stated: "The California Constitution has traditionally embodied innovations and concerns for individual liberties . . . ."

A *per se* common law rule prohibiting speech and withdrawal of services in all peaceful public strikes deprives public employees of the basic personal liberties of association and equal protection of the law, and removes their basic right to improve their wages, living standards and conditions of employment by peaceful economic conduct.[30]

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[30]It should be noted that among public officials and the public in the United States and throughout the democratic world, there is admiration, applause, and even a Nobel Peace Prize for the Solidarity movement in Poland because government employees went on strike against government-owned shipyards and other industries. At the same time, however, the Court of Appeal held that in California, a public employee strike was unlawful, and allowed substantial damages that could finanically cripple the public employee unions and public employees. Another historical irony is that Martin Luther King's birthday was recently made a national holiday, and he was assassinated in Memphis, Tennessee, where he was to parade and demonstrate in support of a city sanitation workers strike.

E. The Court of Appeal Was in Error in Upholding the Trial Court's Allowance of Damages Based on 24 Hour Assignments to Management, Executive and Professional Employees Where No Work Was Required or Performed by Such Employees for the Entire 24 Hour Period.

A considerable amount of testimony was presented during the trial establishing that the District, upon the commencement of the strike, immediately assigned supervising employees, including management, executive and professional employees, to various locations, particularly at the Upstream and Desert Treatment plants and maintenance yards, on a 24 hour basis. Such highly paid employees were paid on a 24 hour basis, even though the District conceded that for a substantial portion of the time, such employees were sleeping, eating, and driving to and from restaurants, etc. A number of witnesses testified on behalf of the Union that such employees, in addition to sleeping and eating, simply read books, entertained their girlfriends and family, and attended parties and barbecues, all of which were considered as work time by the District. See Appellants' Opening Brief, pp. 14-25. As an example, Mark Christensen testified that he worked 12 hours a day as a member of the bargaining unit during the strike at the Palmdale yard, and during the major part of the time all he did was sit around, talk, and watch television along with the other employees. (R.Tr. Vol. 3, pp. 684-714.)

Gilbert Lechuga, another member of the bargaining unit who worked during the strike, testified that one of the management employees, Payne, was present 24 hours a day and slept at the site, and that all that Payne did was read books, walk around the plant, engage in conversa-

tion, and attend the barbecue accompanied by his girlfriend and her daughter. (R.Tr. Vol. 3, pp. 716-736.)

The record is filled with other such testimony, which was uncontradicted by the District.

The Union submitted exhibits showing that reasonable assignments would have been on the basis of 12 hours a day or even 14 hours a day, and that a 24 hour assignment was unreasonable, and that there was no reasonable effort to mitigate the damages.

The Court of Appeal refused to follow the basic rule of damages as set forth in Witkin, *Torts,* Volume IV, Section 870, at p. 3158, that there is a duty to use reasonable care and minimize any losses. *Valencia v. Shell Oil Co.* (1944), 23 Cal.2d 840, holds that a plaintiff is bound to exercise reasonable care and diligence to avoid loss or minimize the resulting damages, and cannot recover for losses which might have been prevented by reasonable efforts. See also *Steelduct v. Henger-Seltzer Co.* (1945), 26 Cal.2d 634; *Kleinclaus v. Marin Realty* (1949), 94 Cal.App.2d 733; *Sheffet v. Los Angeles County* (1970), 3 Cal.App.3d 720.

The Court of Appeal affirmed the Superior Court's disregard of the basic rules of law on damages. The Court of Appeal did not require the Superior Court to follow the law regarding reasonable exercise of the duty to minimize damages. The Court of Appeal had the duty to review the measure of damages and remand, if necessary. See *A. A. Baxter Corp. v. Colt Industries, Inc.* (1940), 10 Cal.App.3d 144; see also Cal.Jur.2d Damages, Section 148, p. 290; *Benson Electric Co. v. Hale Brothers Associated* (1966), 246 Cal.App.2d 686; and *Kitchel v. Acree* (1963), 216 Cal. App.2d 119.

F. The Court of Appeal Improperly Affirmed the Superior Court's Granting of Pre-Judgment Interest.

The Court of Appeal held that the Superior Court did not make any finding that it was exercising its discretion under Civil Code Section 3288, and therefore the pre-judgment interest award was made under Civil Code Section 3287(a), which "establishes the right of the plaintiff to recover prejudgment interest whenever the amount of damages is liquidated, i.e., certain, or capable of being made certain by calculation . . . " (Appendix "A", p. 25.)

The Union set forth fourteen items to establish that there was a substantial dispute as to the amount of damages, and that damages could not be assessed until there had been a full trial and a judicial determination by the Superior Court, and therefore pre-judgment interest was not appropriate. Appellants' Opening Brief, pp. 28-29.

Further, the District did not specify the amount of compensatory damages until it filed its Amended Complaint on June 12, 1979, almost three years after the original Complaint was filed. (C.Tr.: 147.)

The Court of Appeal, in allowing pre-judgment interest, acted contrary to *Levy-Zentner Co. v. So. Pacific Transportation Co.* (1977), 74 Cal.App.3d 762. An award of pre-judgment interest, whether under Section 3288 or Section 3287(a), requires that the amount must have been capable of calculation and not dependent on a judicial determination. The Court of Appeal's decision is also contrary to *Esgro Central, Inc. v. General Insurance Company of America* (1971), 20 Cal.App.3d 1054, *E. L. White, Inc. v. City of Huntington Beach* (1982), 138 Cal.App.3d 366, and *Southern Pacific Transportation Company v. State of California* (1981), 115 Cal.App.3d 116, and *Greater Westches-*

ter Homeowners' Association v. City of Los Angeles (1979), 26 Cal.3d 86.

In *Greater Westchester,* the Supreme Court held that pre-judgment interest for mental and emotional injury in a nuisance action was improper, as the damages were not capable of being made certain by calculation.

In this case, the District, even by its Amended Complaint, claimed $400,000.00 or more in damages, as well as rejecting any offset regarding salaries saved by the District in not paying the striking employees. In addition, during the trial the District attempted to introduce additional damages by way of lost productive time, which was excluded by the Superior Court. Although originally disputed by the District, an offset was allowed as to salaries that were not paid to the striking employees. The Superior Court disallowed a 10% bonus that was paid to certain employees at the landfills. Further, the Court of Appeal reversed the Superior Court and provided that the District did not have the authority to pay time and a half to the management, executive and professional employees and was required to follow the Salary Ordinance, which provided for essential straight time for overtime for such employees. Such a discrepancy between the amount claimed by the District and eventually awarded by the Superior Court and then reduced by the Court of Appeal establishes that there was no clear amount of damages that was certain or could be made certain by calculation that could have been paid by the Union to the District as compensatory damages without the necessity of a full judicial determination.

IV.

CONCLUSION.

For the reasons set forth above, Petitioners request that this Petition for Hearing be granted and that the Court of Appeal's decision be reversed on liability and damages.

DATED: November 16, 1983.

Respectfully submitted,

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and
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APPENDIX D

APPENDIX D

2ND CIVIL NO.

66088

In the Supreme Court of the State of California

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY,
a public agency,
Plaintiff-Respondent,

VS.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION,
AFL-CIO, *et al.,*
Defendants-Petitioners.

Appeal from Los Angeles County Superior Court
Hon. Charles H. Older, Judge

ANSWER TO PETITION FOR HEARING

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2ND CIVIL NO.
66088

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY a public agency,

Plaintiff-Respondent,

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, ET AL.,

Defendants-Petitioners.

ANSWER TO PETITION FOR HEARING

To The Honorable Chief Justice And The Honorable Associate Justices Of The Supreme Court of California:

County Sanitation District No. 2 of Los Angeles County, a public agency, Respondent in the above-entitled appeal, answers and opposes the Petition for Hearing in the Supreme Court as follows:

I.
STATEMENT OF THE CASE

On July 6, 1976, Respondent filed a complaint for injunctive relief and damages, based upon the involvement of Petitioners, Service Employees International Union, Local No. 660 ("Local 660"), Victor N. Hochee, Harry Gluck and Jack Roberts (jointly referred to hereinafter as "Appellants"), in a labor strike against Re-

spondent. (C.Tr. 1, 147)[1] This strike began on July 5, 1976, and lasted until on or about July 16, 1976. On the same date the complaint was filed, Respondent sought and obtained a temporary restraining order. Although the temporary restraining order prohibited Appellants from engaging in the strike, it was ignored. As a result of this failure to obey the order, Local 660 was adjudged guilty of contempt in October 1976, and fined $1,500.00. The propriety of the contempt citation was not appealed.

Thereafter, Respondent proceeded with the prosecution of this action. On August 13, 1981, following a twelve-day bench trial before the Honorable Charles H. Older, judgment was entered in favor of Respondent in the amount of $246,904.00, with interest thereon from July 18, 1976, and costs in the amount of $874.65. (C.Tr. 488)

Appellants appealed from this judgment. The opinion of the Court of Appeal, Second Appellate District (hereinafter cited as "slip op. ____"), issued on October 12, 1983. The Court of Appeal affirmed the trial court's finding of liability, declaring itself "bound by the presently well-settled rules that deny public employees the right to strike and which subject those who do engage in such unlawful labor practices to tort actions for damages." Slip op. 9. The Court of Appeal also affirmed the trial court's award of damages in all respects, with the exception of certain overtime expenses. The Court of Appeal ruled that Respondent could recover for only the overtime paid to managerial employees who operated Respondent's facilities during the strike which was in accordance with the terms of Respondent's Salary Reso-

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[1]The Reporter's Transcript is hereinafter referred to as "(R.Tr.____)"; the Clerk's Transcript is referred to as "(C.Tr.____)"; Trial Exhibits are referred to as "(Ex.____)".

lution, (Ex. 130), and accordingly reduced the damage award to $163,814.00. Slip op. 17-24.

II.

STATEMENT OF THE FACTS

Respondent is one of twenty-seven sanitation districts within Los Angeles County. Each such district is a separate and autonomous political subdivision of the State of California, authorized by *Health & Safety Code* § 4700 *et seq.* (West 1970 & Supp. 1983). (R.Tr. 11-13) County Sanitation District No. 2 of Los Angeles County is authorized by a joint powers agreement, (Ex. 120), to act on behalf of itself and the twenty-six other districts in numerous matters, including personnel and labor relations. (These twenty-seven sanitation districts are hereinafter jointly referred to as "the District").

The District operates sanitary landfills for the disposal of rubbish, sewage treatment plants and approximately 11,000 miles of sewer trunk lines. (R.Tr. 11-12, 260) The landfills in use in 1976 included the Palos Verdes, Puente Hills, Mission Canyon, Scholl Canyon, Spadra and Calabasas facilities, which together received about 15,000 tons of refuse each day. (R.Tr. 350) The eleven sewage treatment plants, which include the Long Beach Los Coyotes, Whittier Narrows, San Jose Creek, Pomona, Saugus, Valencia, Palmdale, Lancaster and La Canada water renovation plants, were processing 450 million gallons of raw sewage each day. (R.Tr. 261; Ex. 102 through Ex. 119) Most of these plants are upstream "feeders" to the Joint Water Pollution Control Plant ("JWPCP") located in Carson.[2] (R.Tr. 261) In maintaining these

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[2]The District maintained other facilities, such as maintenance yards in Palmdale, Compton and San Gabriel, the South Gate

operations, the District served approximately four million County residents. (R.Tr. 12)

The District's labor relations are governed by the Meyers-Milias-Brown Act, *Gov't Code* §§ 3500-3511 (West 1980 & Supp. 1983), and its Employee Relations Resolution, (Ex. 122), as authorized under that Act. Local 660 is a labor organization affiliated with the Service Employees International Union, AFL-CIO, which has represented the District's blue-collar employees since 1973. At all times pertinent Victor N. Hochee was the general manager of Local 660, (R.Tr. 23, 421), Harry Gluck was Local 660's manager of representational services, (R.Tr. 618, 622), and Jack Roberts was one of its field business representatives. (R.Tr. 412)

The District and Local 660 have bargained concerning the wages, hours and working conditions of the District's blue-collar employees, under the Meyers-Milias-Brown Act, since 1973. (R.Tr. 24-25) Each year[3] these negotiations resulted in a binding labor contract or Memorandum of Understanding ("MOU"). *See Glendale City Employees Ass'n v City of Glendale,* 15 Cal. 3d 328, 124 Cal. Rptr. 513, 540 P.2d 609 (1975), *cert. denied,* 424 U.S. 943 (1976).

Local 660 has struck in support of its collective bargaining demands on two occasions. In June 1974, Local 660 engaged in a five-day strike supported by virtually all the District's blue-collar employees. (R.Tr. 711, 936) Local 660's second strike, the subject of this lawsuit, lasted from July 5 through July 16, 1976. (R.Tr. 419-20) Despite approximately nineteen negotiation meetings

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Transfer Station and forty-six pumping stations, as well as a Joint Administrative Office ("JAO"). (R.Tr. 260-62)

[3]Prior to 1977, MOUs were one year in duration.

over a three and one-half month period prior to the 1976 strike, and the District's comprehensive, compromise proposals on June 23 and July 1, 1976, the parties were unable to reach agreement on the terms of a new MOU (R.Tr. 590-95), and Appellants went on strike.

Local 660 prepared for the 1976 strike well in advance of July 5, 1976, the date on which the strike began. Such preparations included the hiring of a media consultant; the purchase of newspaper ads; the preparation, stockpiling and distribution of picket signs; the written request to the Service Employees International Union and the Los Angeles County Federation of Labor for strike sanctions; the printing of brochures; the renting and equipping of local strike headquarters; the appointment of picket "captains"; the preparation of "hot-line" telephone messages;[4] and other strike-related activities. (R.Tr. 35-36, 420, 423-26, 598, 617; Exs. 126, 184, 187, 191, 192; C.Tr. 138-40, 158, 209-14)

Also before the strike began, employees attempted to sabotage vital equipment at the JWPCP, the District's main sewage treatment plant. Management personnel replacing blue-collar employees, shortly after 10:00 p.m. on July 5, discovered a sewage discharge line blocked with a plywood disc. Plant vehicles, their keys hidden in the hubcaps, were found blocking the entrance to the standby generator building. (Ex. 157) The battery cables to the standby generator had been cut. (Exs. 157, 175, 176)

On July 6, 1976, management personnel discovered a particularly dangerous condition in the large, sewage "digestion" tanks at the JWPCP. For two or three days

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[4]Local 660's "hot-line" consisted of pre-recorded telephone messages concerning the strike and negotiations. (See R.Tr. 420-21; Ex. 191; C.Tr. 167-72)

prior to the strike, employees had deliberately overfed the anaerobic bacteria in these tanks with sewage. This overfeeding caused a serious decrease in bacterial production of methane gas, which is used to power effluent pumps and other critical equipment at the JWPCP. The effluent pumps are necessary to prevent inflowing sewage from flooding the JWPCP in a manner that would severely incapacitate and damage the plant. Had these sabotage attempts not been uncovered, a disruption in the primary source of power in combination with the incapacitation of standby generators could have crippled a facility whose operation is critical to the health of the community. (R.Tr. 383, 833, 948; C.Tr. 136, 158-59, 183, 221)

During the strike, the pickets distributed leaflets and attempted to dissuade customers from using District facilities. (Exs. 183, 185; C.Tr. 158-59, 162-66) Entrances to District work sites were routinely strewn with roofing nails and broken glass; fences, gates and vehicles were damaged. (R.Tr. 325-30; Ex. 157)

Further, significant amounts of debris[5] were introduced into the sewer system immediately upstream from the JWPCP. Unless such debris is quickly removed from the mechanical rakes and screens, which prevent such flotsam from entering the JWPCP, the effluent flow would be dammed and the rakes damaged. (R.Tr. 262, 327-29) During the strike, this debris caused precisely such damage. *Id.*

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[5]Items retrieved from the inflowing sewer system included a mattress, tires, a canvas tarpaulin, upholstered cushions, carpeting and cabinet doors. (R.Tr. 328-29; Ex. 157, 158, 159) Such articles do not normally come down the sewer system, and never in such quantity. (R.Tr. 329); Slip op. 12-13.

Despite acts of sabotage and picket line problems, District operations were not significantly impaired. During the second week of the strike, discussions resumed and by Friday, July 16, 1976, the parties reached a tentative agreement on a new MOU, the terms of which were the same as the District's July 1, 1976 offer. (See Exs. 182, 335; R.Tr. 629) There has been no strike activity by the District's employees subsequent to July 1976. (R.Tr. 1012)

III.

ARGUMENT

A. Absent Legislative Authorization, Public Employees Have No Right To Strike.

1. At Common Law, Public Employees Have No Right To Strike.

Appellants' fundamental argument in their Petition for Hearing is that the legality of public sector strikes, in the absence of legislative authorization, is an open question in California, and that this Court should now expressly legitimate such strikes.

Appellants' first assertion that the legality of public sector strikes is an open question in this State is incorrect. The rule that public employee strikes are illegal, absent legislative authorization, was recognized by this Court in *Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen,* 54 Cal. 2d 684, 8 Cal. Rptr. 1, 355 P.2d 785 (1960), and has been applied thereafter with complete consistency by the Courts of Appeal, including the Court of Appeal in this case.[6] While

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[6]*See, e.g., International Brotherhood of Electrical Workers, Local Union 1245 v. City of Gridley,* 121 Cal. App. 3d 169, 175 Cal. Rptr. 274

the Court of Appeal noted that much has been written on the subject of labor relations in the public sector and the advisibility of granting public employees the right to strike, *see* slip op. 3-4, the Court correctly concluded that the rule barring public sector strikes in the absence of legislative authorization is and has been the law in this State.[7]

(1981), *rev'd on other grounds,* 34 Cal.3d 191, 193 Cal. Rptr. 518, 666 P.2d 960 (1983); *Stationary Engineers v. San Juan Water District,* 90 Cal. App. 3d 796, 801, 153 Cal. Rptr. 666 (1979); *Pasadena Unified School District v. Pasadena Federation of Teachers,* 72 Cal. App. 3d 100, 140 Cal. Rptr. 806 (1977); *Service Employees' International Union, Local No. 22 v. Roseville Community Hospital,* 24 Cal. App. 3d 400, 408, 101 Cal. Rptr. 69 (1972); *Trustees of California State Colleges v. Local 1352, S.F. State etc. Teachers,* 13 Cal. App. 3d 863, 867, 92 Cal. Rptr. 134 (1970); *City of San Diego v. American Federation of State etc. Employees,* 8 Cal. App. 3d 308, 310, 87 Cal. Rptr. 258 (1970); *Almond v. County of Sacramento,* 276 Cal. App. 2d 32, 35, 80 Cal. Rptr. 518 (1969); *cf. San Diego Teachers' Ass'n v. Superior v. Superior Court,* 24 Cal. 3d 1, 154 Cal. Rptr. 893, 593 P.2d 838 (1979) (Public Employment Relations Board has exclusive initial jurisdiction for purposes of injunction to determine whether a strike by public school employee organizations recognized or certified as exclusive representatives is an unfair labor practice and what, if any, remedies PERB should pursue).

[7]There can be no suggestion, as Appellants imply, that the courts in this State somehow invented this common law prohibition against public sector strikes. Indeed, at common law, all strikes were deemed illegal and subject to injunction and suits for damages. *See Commonwealth v. Pullis,* Mayor's Court of Philadephia (1806) (Reported in 3 J. Commons, *Documentary History of American Industrial Society,* 59 (1910); *Walker v. Cronin,* 107 Mass. 555 (1871); *Vegelahn v. Guntner,* 67 Mass. 92, 44 N.E. 1077 (1896); *Loewe v. Lawlor (Danbury Hatters),* 208 U.S. 274 (1908). Congress, gradually, through a series of legislative enactments, not only granted private sector employees a right to strike and to engage in other concerted activities, but also deprived employers of their traditional remedies of injunction and damage suits. *See* 38 Stat. 730 (1914) (Clayton Antitrust Act), codified as amended at 15 U.S.C. §§ 15, 17, 26 (1970), 29 U.S.C. § 52

Nor are the California courts alone in recognition of this prevailing common law rule. As the United States District Court for the District of Columbia stated, with the approval of the United States Supreme Court:

> "At common law no employee, whether public or private, had a constitutional right to strike in concert with his fellow workers. Indeed, such collective action on the part of employees was often held to be a conspiracy. When the right of private employees to strike finally received full protection, it was by statute, Section 7 of the National Labor Relations Act, ... It seems clear that public employees stand on no stronger footing in this regard than private employees and that in the absence of a statute, they too do not possess the right to strike.... *It is fair to conclude that, irrespective of the reasons given, there is a unanimity of opinion in [sic] the part of courts and legislatures that government employees do not have the right to strike.*"

United Federation of Postal Clerks v. Blount, 325 F. Supp. 879, 882 (D.D.C. 1971), *aff'd,* 404 U.S. 802 (1971) (cita-

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(1970); 47 Stat. 70 (1930) (Norris-LaGuardia Act), codified at 29 U.S.C. §§ 101-15 (1970); 47 Stat., Part II 577 (1926) (Railway Labor Act), codified as amended at 45 U.S.C. §§ 151-88 (1970); 49 Stat. 449 (1935) (Wagner Act), codified as amended at 29 U.S.C. §§ 151-97 (1970). Several states, including California, enacted their own versions of the above federal statutes, granting and protecting private sector employees' rights to engage in strikes, picketing and other collective activities. *See, e.g., Labor Code* §§ 921-923 (West 1983). In summary, the common law prohibition against strikes of all types, whether by public or private sector employees, was not created by California's judiciary based upon public policy. Moreover, where the prohibition against strikes has been lifted, whether in the public or private sectors, it has been through legislative action. *See United Federation of Postal Clerks v. Blount,* 325 F. Supp. 879, 882 (D.D.C. 1971), *aff'd,* 404 U.S. 802 (1971).

tions omitted) (emphasis added). Even the most vocal advocates of a public employee right to strike recognize the long-standing rule, both at common law and as codified in various statutes, that strikes by public sector employees are illegal. *See, e.g.*, Hanslowe & Acierno, "The Law and Theory of Strikes by Government Employees," 67 *Cornell L. Rev.* 1055, 1059-61 (1982).

Appellants' contention that the legality of public sector strikes generally, or of the strike involved in this case, is somehow an open question is without legal basis. Although this Court has not addressed directly the legality of public employee strikes in the absence of legislative authorization since the *Railroad Trainmen* case, there is no doubt that Appellants request a sweeping and fundamental change in existing law.

2. The Legislature Has Not Legitimated Public Employee Strikes Under The Meyers-Milias-Brown Act.

The Meyers-Milias-Brown Act does not expressly or impliedly grant public employees a right to strike. As Professor, now Justice Grodin, recognized:

> "Evidence of legislative validation [of strikes under the Meyers-Milias-Brown Act] is difficult to find, particularly in light of section 3509 which specifically denies legislative intent to make the provisions of section 923 of the Labor Code applicable to public employees.[177]

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[177] *Cal. Labor Code* § 923 . . . protects, *inter alia*, the right of employees to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid or protection.' This section protects the right to strike in the private sector."

Grodin, "Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts," 23 *Hastings L.J.* 719, 758 (1972) (citation omitted) (hereinafter cited as "Grodin at ____"). Section 3509 of the Government Code was thus clearly intended to dispel any inference that the Meyers-Milias-Brown Act gave public sector employees covered thereunder a right to engage in "other concerted activities," including a right to strike.[8] *See Los Angeles Metropolitan Transit Authority v. Railroad Trainmen,*

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[8]There is a similar provision in the Education Employment Relations Act ("EERA"), *Gov't Code* § 3549. In *San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1, 154 Cal. Rptr. 893, 593 P.2d 838 (1979), this Court held that this provision "does not prohibit strikes but simply excludes the applicability of Labor Code Section 923's protection of concerted activities." 24 Cal. 3d at 13. This interpretation of Section 3549 by no means should be applied to Section 3509. The Court in *San Diego Teacher's Ass'n* reasoned that excluding applicability of Section 923 was necessary because of the legislative scheme of the EERA, as administered by the Public Employment Relations Board. Thus, the "wholesale introduction of rules protecting collective bargaining in the private sector into the public sector," 24 Cal. 3d at 6, would have conflicted with the comprehensive and detailed EERA.

Conversely, the Meyers-Milias-Brown Act, unlike the EERA, is not a comprehensive regulatory scheme. *See IBEW, Local 1245 v. City of Gridley, supra,* 34 Cal. 3d at 197 (citations omitted); J. Grodin, D. Wollett & R. Alleyne, *Collective Bargaining in Public Employment*, preface to first edition at xi (BNA) (3d ed. 1979). The potential for conflict between Section 923 of the *Labor Code* and the Meyers-Milias-Brown Act is therefore far less than the conflict considered in *San Diego Teachers' Ass'n.* Thus, interpreting Section 3509 the same as Section 3549, as being designed to avoid conflict between statutory schemes, would render Section 3509 largely superfluous. In any event, the distinction appears more semantical than real, since it is precisely the "wholesale introduction" of private sector strike protections into labor relations under the Meyers-Milias-Brown Act which Appellants seek. Section 3509 precludes this even if interpreted the same as Section 3549.

supra (right to engage in "other concerted activities" generally indicates a right to strike).

More fundamentally, the prohibition against public sector strikes had been recognized for years prior to the enactment of the Meyers-Milias-Brown Act in 1968. It would have been unnecessary expressly to prohibit by statute conduct which the common law already rendered illegal. Conversely, a provision such as Section 3509, designed to avoid any inference of a legislative change in the common law rule prohibiting public employee strikes, was clearly appropriate. Because of the common law rule, there was no need for the State Legislature in 1968 to address the issue of whether the Meyers-Milias-Brown Act should expressly prohibit strikes in the first instance.

Moreover, as this Court has recognized, the Meyers-Milias-Brown Act was the product of political compromise. *See IBEW, Local 1245 v. City of Gridley, supra*, 34 Cal. 3d at 197; *see also* Grodin at 761 ("[the Meyers-Milias-Brown Act] reflect[s] legislative indecision in the face of varying views and conflicting political forces."). Had the proponents of a right to strike been politically able to include such in the Meyers-Milias-Brown Act, they undoubtedly would have done so. The absence of an express grant of such a right in the statute leaves the inescapable conclusion that the Legislature did not intend such. Appellants' invitation to this Court to declare the strike in this case legal, thus seeks to achieve by judicial fiat what was politically unobtainable in the Legislature.

Nor is there any implication in the statute mandating a right to strike. It does protect the right of covered employees to join unions of their own choosing, and have those unions represent them in collective negotiations, concerning "wages, hours, and other terms and conditions

of employment." *Gov't Code* §§ 3503 & 3504 (West 1980). The statute also imposes an affirmative obligation on the public employer to "meet and confer in good faith" with such employee representatives. *Id.* at § 3505. Appellants apparently argue that the mandate to "meet and confer" necessarily implies resort to economic weapons such as strikes and picketing. This argument, however, proves too much.

Even those commentators generally favoring a grant of the right to strike to public sector employees recognize, as do Appellants, that in some cases the proposed right to strike must be denied. *See* Burton & Krider, "The Role and Consequences of Strikes by Public Employees," 79 *Yale L. J.* 418, 433 (1970) ("Despite arguments to the contrary, we feel that strikes in some essential services, such as fire and police, would immediately endanger the public health and safety and should be presumed illegal.") (hereinafter cited as "Burton & Krider at ____"); Grodin at 759 ("I tend to the view that a ban on strikes by public employees is both unwise and inequitable, unless it is limited to strikes which imperil public health or safety."). Similarly, some commentators have suggested mandatory or binding arbitration as a final step in public sector collective bargaining, in lieu of a right to strike. *See, e.g.,* Grodin, "Political Aspects of Public Sector Interest Arbitration," 64 *Cal. L. Rev.* 678 (1976). Clearly, therefore, if meaningful public sector bargaining can occur in the absence of a strike threat, as these commentators recognize, there is certainly no implication that the "meet and confer" requirement of the Meyers-Milias-Brown Act implicitly sanctions a right to strike.

3. The Grant By This Court Of A Right Of Public Sector Employees To Strike, Even As Limited By Appellants, Involves Substantial Policy Questions, More Appropriately Resolved By The Legislature

Neither Appellants nor responsible commentators who favor public sector strikes, advocate an unfettered, absolute right to strike. Instead, Appellants propose a "clear and present danger" test as a limitation upon strikes under the Meyers-Milias-Brown Act. Under this test, any such strike would be a legitimate means of economic coercion, unless and until a showing could be made to the superior court that continuation of the strike would pose a clear and present danger to public health or safety.[9]

This proposed test is seriously deficient in a variety of respects. First and foremost, there is absolutely no justification for Appellants' position, which effectively establishes the courts of this State as the primary arbiters of when and whether a public sector strike under the Meyers-Milias-Brown Act is legal. The West Virginia Supreme Court has stated the problem succinctly:

> "[I]n most other states the legislature has made an effort to make some statutory accommodations to the labor relation problems that exist in the public sector. Indeed, it was the initial inability of the courts to judicially resolve [sic] the competing interests of private employees and private employers that led to federal legislation in the labor law field. Most if not all commentators in the labor law area agree that the

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[9]While their position is unclear, Appellants would apparently justify even a strike which endangers public health or safety, if it is in response to a public employer's unfair labor practices under the Act. *See* Petition for Hearing at 24-25. The effect of a public employer's "bad faith" under the Act is discussed in Part C(2).

> complex issues in this field are ill suited to any comprehensive judicial solution."

City of Fairmont v. Retail etc. Union, 283 S.E.2d 589, 595 (W.Va. 1981).

Mr. Justice Brandeis, in his dissent in *Duplex Printing Press Co. v. Deering,* 254 U.S. 443 (1921), voiced similar views. Criticizing the majority in that case for failing to give effect to sections of the Clayton Antitrust Act, 15 U.S.C. §§ 15, 17, 26 (1970), a congressional attempt to exempt certain union activities from the reach of the Sherman Antitrust Act, he stated:

> "All rights are derived from the society in which they exist; above all rights rises duty to the community. The conditions in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest, and to declare the duties which the new situation demands. This is the function of the legislature, ..."

254 U.S. at 488, quoted with approval in *Seven Up Bottling Co. v. Grocery Drivers Union Local 848,* 40 Cal. 2d 368, 377 (1953). As noted above, the grant and protection of the right to strike, both in the public and private sectors, has virtually always been accomplished through legislative action. Accordingly, the question is whether the courts are the appropriate forum in which the complex, policy questions surrounding public sector labor relations should be resolved. Given the fact that the common law prohibition against public sector strikes is supported by unanimous judicial precedent, which the Legislature has

not seen fit to overrule,[10] Respondent submits that these questions are most appropriately directed to this State's policy-making body, the Legislature.

Also of significance is what Appellants' proposed test does not address. Appellants apparently suggest that a "clear and present danger" test be the only restriction on public sector strike activity. In the absence of a danger to public health or safety, Appellants would reason, a strike by public employees covered by a Meyers-Milias-Brown Act would be legal. Such could include secondary boycotts or strikes to force a public employer to recognize a particular union as the representative of certain employees, strikes which in the private sector could well be illegal. *See* 29 U.S.C. § 158(b)(4) and (7)(C) (1970). The proposed "clear and present danger" test fails to deal in any way with the complex questions of whether the means or objectives of a strike by public employees might render it illegal, in the absence of a risk to health or safety. Thus, any declaration that some public sector strikes under the Meyers-Milias-Brown Act may be legal necessarily entails, at some point, judicial resolution of these complex policy questions involving intricate balancing of competing interests in public sector labor relations entirely without legislative guidance,[11] or an expert agency, such as the National Labor Relations Board or the Public

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[10]Legislation in California regarding public sector labor relations has been substantial. In addition to the Meyers-Milias-Brown Act, *see, e.g.*, EERA, *Gov't Code* § 3540 *et seq.* (West 1980 & Supp. 1983); Higher Education Employer-Employee Relations Act, *Gov't Code* § 3560 *et seq.* (West 1980 & Supp. 1983); State Employer-Employee Relations Act, *Gov't Code* § 3512 *et seq.* (West 1980 & Supp. 1983). Despite these substantial legislative schemes, the Legislature has steadfastly refused to grant public sector employees a right to strike akin to that of private sector employees.

[11]*See* footnote 8, *supra.*

Employment Relations Board. In summary, the blanket authorization of public sector strikes under the Meyers-Milias-Brown Act, even as Appellants would limit it, would open a veritable Pandora's Box of policy issues more appropriately addressed to the State Legislature.

B. There Is No Constitutional Right To Strike

Appellants also argue that the right to strike is of constitutional dimensions, relying primarily on guarantees in the California Constitution of freedom of speech and assembly, and of equal protection of the law. California courts have rejected similar contentions on numerous occasions.

In *Pasadena Unified School Dist. v. Pasadena Federation of Teachers, supra*, the court, after extensive discussion of the relevant case law, concluded:

> "The foregoing authorities support the constitutionality of even prior restraint upon speech advocating an illegal strike by public employees. If such prior restraint is permissible, a fortiori the restraining effect of subsequent liability for damages which plaintiff here seeks to impose does not violate defendants' free speech rights."

72 Cal. App. 3d at 110; *see also, City and County of San Francisco v. Evankovich*, 69 Cal. App. 3d 41, 137 Cal. Rptr. 883 (1977); *Los Angeles Unified School District v. United Teachers*, 24 Cal. App. 3d 142, 100 Cal. Rptr. 806 (1972). Thus, the courts in this state have never held that the common law prohibition of public sector strikes infringes upon free speech guarantees.

The court in *City of San Diego v. American Federation of State etc. Employees Local No. 127, supra*, after assuming that the right to strike was a "fundamental interest"

under traditional equal protection analysis, unequivocally rejected an equal protection argument similar to that advanced by Appellants here. The court noted:

> "[The Union] argues the rule of law denying a gardener on a public golf course the right to strike while affording a gardener on a private golf course that right, does not serve a compelling state interest. The reasons for the law denying public employees the right to strike while affording such right to private employees are not premised on differences in types of jobs held by these two classes of employees but upon differences in the employment relationship to which they are parties. *The legitimate and compelling state interest accomplished and promoted by the law denying public employees the right to strike is not solely the need of a particular governmental service but the preservation of a system of government in the ambit of public employment and the proscription of practices not compatible with the public employer-employee relationship.*"

8 Cal. App. 3d at 315 (citation omitted) (emphasis added). Of course, the instant case involves not a "gardener on a public golf course," but employees whose work directly affects the health and welfare of four million citizens of this State. Thus, Appellants' argument is even less persuasive than that rejected in *City of San Diego.*[12]

In sum, Appellants' constitutional arguments that public employees are entitled to strike have never been accepted by the courts, and must be rejected here. No

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[12]As more fully set forth in Part C, *infra*, the strike in this case would be illegal even were Appellants correct that an absolute ban on public sector strikes is unconstitutional, as it placed at substantial risk the public health.

hearing before this Court is needed for further argument on these issues.

C. Assuming, Arguendo, Employees Under The Meyers-Milias-Brown Act May Have A Limited Right To Strike, The Strike In This Case Was Nevertheless Illegal.

1. The Strike In This Case Placed At Substantial Risk The Health Of The Community.

As noted above, no responsible advocate of a right to strike, whether in the public or private sector, has endorsed an unfettered right to engage in such conduct. For example, Mr. Justice Brandeis stated "[n]either the common law, nor the [Constitution], confers the absolute right to strike." *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926). Moreover, both commentators and state legislatures addressing the issue have agreed to the necessity of prohibiting strikes which endanger the public health or safety. *See* Grodin at 759; Petition for Hearing at 9-10 n. 9. The facts in the instant case clearly demonstrate that any strike against the District by Appellants puts at substantial risk the health of four million citizens of this State.

The arguments in favor of allowing public sector employees a right to strike are predicated primarily upon the notion that strikes are a necessary ingredient for meaningful bargaining. Without such a right, some argue, the public sector union has no means of applying pressure to the public entity, and public employers have no incentive to engage in serious collective bargaining.

The implicit premise of this argument is the fundamental truth that the intent of any economic[13] strike is to pressure the employer by either inhibiting or stopping its ability to operate. *See* Burton & Krider at 419-20. If an employer can continue to operate during a strike, it has less incentive to "sweeten" its offer at the bargaining table.

In the instant case, there is abundant evidence within the record that impairing or completely curtailing the District's ability to operate its landfills and sewage treatment plants was precisely Appellants' objective. Wholly apart from picketing and distribution of leaflets urging landfill users not to utilize the District's facilities, the evidence demonstrated substantial and sophisticated sabotage attempts, primarily directed toward the District's large sewage processing plant, the JWPCP. *See* discussion at pp. 6-7, *supra.*

Had Appellants been successful in their express intent to shut down the District's sewage treatment plants, *see* (Ex. 191), over four billion gallons of raw sewage could have been discharged into the Pacific Ocean. The consequences of such an occurrence would be disastrous. *See, e.g., State of California v. City and County of San Francisco,* 94 Cal.App.3d 522, 156 Cal.Rptr. 542 (1979) (six-day sewage worker strike — court detailed the incalculable harm the discharge of four hundred twenty-six million gallons of sewage caused, a mere one-tenth of the amount potentially involved here); *Caso v. District Council 37,*

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[13]The term "economic" used in describing Appellants' strike, refers only to the fact that it concerned wages and other terms and conditions of employment. There is, of course, substantial debate as to whether there is a distinction between economic pressure on a private employer and political pressure on a public employer, by means of a strike. *See* Burton & Krider at 428-33.

American Federation etc. Municipal Employees, 43 App. Div. 2d 159, 350 N.Y.S. 2d 173 (1973) (sanitation strike resulted in discharge of one billion gallons of untreated sewage into East River); (R.Tr. 330-34, 327, 358; Ex. 189, Ex. 183) Furthermore, had the employees been successful in the attempted sabotage of the JWPCP, and this facility had flooded with inflowing sewage, substantial damage to equipment could have rendered it completely inoperable.

Any declaration by this Court that the strike in this case was in any manner legitimate, thus necessarily permits Appellants to engage in conduct which has as its objective incalculable risk to the health of millions of citizens and to the ecology.

Appellants, in proposing their "clear and present danger" test, essentially argue that the strike in the instant case should have been illegal and subject to injunction only if it had been effective in closing down the District's facilities. Since the strike was ineffective, Appellants contend that it was not illegal. *See* Petition for Hearing at 18. Appellants' apparent position is completely at odds with their extended argument concerning the desirability of a right to strike.

The central theme in the Petition for Hearing is that public sector bargaining is meaningless without an effective, credible strike threat. Appellants then suggest a rule which would allow them to engage only in ineffective strikes. Certainly, the threat of an unsuccessful strike puts no more pressure on a public employer than does the complete absence of a strike threat. Thus, Appellants' proposed "clear and present danger" test completely undercuts their own policy arguments for legitimating public sector strikes.

Moreover, Appellants' analysis overlooks critical facts in this case. As noted, employees attempted to sabotage

the JWPCP. Had these attempts been successful, no amount of *ex post facto* judicial intervention could have rendered the JWPCP immediately operable. The strike may have been enjoined under Appellants' proposed rule, but that would not have stopped the irreparable harm to the public which would already have occurred. Furthermore, Appellants ignored the injunctions of both the 1974 and 1976 strikes. There is no reason to suppose that they would comply with an injunction entered after a judicial determination that their conduct constituted a "clear and present danger" to the health of the community.

Appellants' suggestion that no injunction would have been appropriate in this case under their "clear and present danger" test, ignores the purpose of any injunction, which is to avoid irreparable harm. It is the potential harm that is significant. If Appellants' test were appropriately applied, therefore, any strike against the District would be illegal and subject to injunction, since any such strike would involve substantial risk to millions of citizens. In sum, this strike was illegal even under Appellants' proposed analysis.

2. A Public Employer's Lack Of Good Faith Under The Meyers-Milias-Brown Act Is Not A Justification For A Strike; In Any Event, The District Met And Conferred In Good Faith

Appellants would also justify, on a theoretical level, strike conduct in response to bad faith under the Meyers-Milias-Brown Act. This theoretical justification is neither legally sufficient nor factually supported in this case.

The courts of this state have uniformly rejected the notion that a public agency's lack of good faith in "meet-

ing and conferring" under the Meyers-Milias-Brown Act[14] justifies illegal strike activity. In *Stationary Engineers Local No. 39 v. San Juan Suburban Water District, supra,* the court categorically stated:

> "[U]nder California law public employees have no right to strike whether their employer violates the Meyers-Milias-Brown Act or not."

90 Cal. App. 3d at 801 (citation omitted); *see also Los Angeles Unified School District v. United Teachers, supra; Trustees of California State Colleges v. Local 1352, supra; City of San Diego v. American Federation of State etc. Employees, supra; Almond v. County of Sacramento, supra; see generally, City and County of San Francisco v. Evankovich, supra,* 69 Cal. App. 3d at 47-48, and cases cited there; *Gov't Code* § 3509 (West 1980). Furthermore, Appellants have a judicial remedy for bad faith, through mandamus proceedings. *See Placentia Fire Fighters, Local 2147 v. City of Placentia,* 57 Cal. App. 3d 9, 129 Cal. Rptr. 126 (1976).

Even assuming that the failure to confer in good faith might, in some instances, constitute a defense or justification for otherwise illegal strike activity, such a theory has no application in this case. Indeed, the record conclusively demonstrates the District's good faith under the Myers-Milias-Brown Act.[15] There is no evidence that the

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[14]The requirement that parties "meet and confer" is less comprehensive than a requirement to engage in "collective negotiations" or "bargaining." *See* Grodin at 730-31 n. 56. Thus, even though Appellants reference meeting and conferring under the Meyers-Milias-Brown Act as "bargaining" or "negotiating," this characterization is not wholly accurate.

[15]As Justice Reynoso stated in his concurring opinion in *Stationary Engineers v. San Juan Suburban Water Dist., supra,* 90 Cal. App. 3d at

District ever failed or refused to "meet and confer in good faith regarding wages, hours, [or] other terms and conditions of employment." *Gov't Code* § 3505 (West 1980). There is no evidence that the District was not seriously trying to reach an agreement. The Trial Court expressly found that the District

> "and its authorized representatives met and conferred in good faith, and met promptly, upon request, for a reasonable number of times, and exchanged proposals and concessions in a good faith attempt to arrive at the terms of a negotiated Memorandum of Understanding, both prior to and after the July 5, 1976 inception of the aforementioned strike activities."

(C.Tr. 483) The Trial Court further concluded as a matter of law that the District "met and conferred in good faith with [Local 660] . . . and at no time was . . . guilty of unclean hands." (C.Tr. 486)

Appellants' allegations of bad faith rest on two contentions. First, Appellants imply that the District's proposals, including an alleged pay cut, were substantively unacceptable, and therefore in bad faith. Second, Appellants claim that the District's condition on its July 1 offer[16] that Local 660's negotiating committee recommend

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805, the finding of good faith is one of fact, and must be upheld if supported by substantial evidence.

[16]Prior to the strike, on June 23, 1976, the District proposed a comprehensive, compromise offer, which Local 660 rejected. (R.Tr. 163-66) On July 1, 1976, the District offered a package of economic and other concessions beyond those of June 23, (R.Tr. 246-47), conditioned on recommendation by Local 660's negotiating committee of acceptance to the membership. Local 660 initially rejected this July 1 offer, the offer which it ultimately accepted on July 16. (R.Tr. 169-73, 593, 625-26)

this offer to the District's employees was in bad faith. Neither of these allegations has any factual or legal substance.

Proposal of a pay cut does not establish bad faith. In *Placentia Fire Fighters, Local 2147 v. City of Placentia, supra,* for example, the plaintiff labor union sought to show the defendant city's bad faith based, *inter alia,* on its proposed reduction of hours from sixty-seven to forty per week and elimination of certain fringe benefits. The court rejected this argument, reasoning that the Meyers-Milias-Brown Act contains "the right to remain firm." 57 Cal. App. 3d at 22; *see also, Los Angeles Met. Transit Authority v. Railroad Trainmen, supra,* 54 Cal. 2d at 693. This right is also contained in the National Labor Relations Act, 29 *U.S.C.* § 158(d), which expressly excludes from the duty to bargain in good faith any obligation of "either party to agree to a proposal or . . . [to] mak[e] a concession." Appellants would apparently involve the courts in evaluating whether a proposal under the Meyers-Milias-Brown Act was substantively sufficient or acceptable, essentially placing the courts in the role of final arbitrator of such proposals. Contrary to Appellants' assertions, the courts should not be involved in evaluating the merits of proposals for MOUs. In any event, neither the District's June 23 offer nor its July 1 offer would have resulted in a pay cut. (R.Tr. 148-49, 240-42, 619, 628-29, 1049; *see* Ex. 182, Ex. 355) Appellants' first contention is, therefore, wholly without merit.

Appellants' second contention is little more than a conclusory, unsupported statement. Appellants cite no authority, nor is there any, for the novel proposition that conditioning an offer on recommendation of acceptance constitutes a failure to meet and confer in good faith under the Meyers-Milias-Brown Act. Furthermore, there

is no evidence in the record that striking employees in this case even knew of the condition. Logically, therefore, the strike could not have been in response to this conduct. The conditional offer cannot function as a justification for Appellants' conduct, even were it in bad faith.

In sum, even were this Court to find that some strikes under the Meyers-Milias-Brown Act are permissible, the potential that strikes such as that in the instant case might cause substantial harm to the public health and welfare, would render the strike herein illegal, regardless of whether the District met and conferred in good faith. Moreover, the trial court's findings that the District met and conferred in good faith are correct and supported by substantial evidence. The Court of Appeal's decision was therefore correct, obviating any need to grant the Petition for Hearing herein.

D. The Award Of Tort Damages Is An Appropriate Remedy For Appellants' Strike Activity.

Appellants' illegal strike caused the District monetary damages. Such damages were expenses incurred in the District's successful attempt to mitigate the incalculable harm which would have resulted had Appellants been able to prevent the District's landfills and sewage treatment plants from operating.

The Meyers-Milias-Brown Act provides neither remedies for illegal strikes nor an administrative tribunal to determine and impose appropriate sanctions for such conduct. This is not a case, therefore, where the Legislature has changed common law remedies or preempted a judiciary's authority to apply such, *see Lamphere Schools v. Lamphere Federation of Teachers,* 400 Mich. 104, 252 N.W. 2d 818 (1977) (holding court's authority to impose a damage remedy for illegal strike preempted by legisla-

tive action), nor is this case in a jurisdiction where there is no prior, common law tort damage remedy for an illegal strike. *See City of Fairmont v. RWDSU, supra.*

As discussed above, private sector unions and employees were subject both to injunctions and suits for damages for economic strike activities under various common law and statutory theories. *See* footnote 7, *supra.* Private sector unions are currently subject to the sanction of damages and injunctive relief for breach of collective-bargaining agreements, *see Boys' Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970); 29 *U.S.C.* § 185 (1970), and for certain types of strike activities. 29 *U.S.C.* § 158(b)(4), 160(1) & 187 (1970).

The courts in this State have expressly recognized that "[t]he conduct of an unlawful strike is itself a tort for which damages may be recovered." *Pasadena Unified School District v. Pasadena Federation of Teachers, supra; see also State of California v. City and County of San Francisco, supra* (recovery of civil penalties for strike-caused damage against both employer and striking sanitation union); *cf. Caso v. District Council 37, supra* (tort damages awarded to municipalities injured by discharge of untreated sewage against striking sanitation union).

This common law remedy also finds support in this Court's decision in *El Rancho Unified School District v. National Education Ass'n,* 33 Cal. 3d 946, 192 Cal. Rptr. 123, 663 P.2d 893 (1983). The "principal issue" in that decision was

> "whether EERA divests a superior court of jurisdiction to entertain a school district's tort suit for damages arising out of a teachers' strike led by noncertified unions."

33 Cal. 3d at 953. This Court held that the Legislature, through the EERA, had preempted such jurisdiction. Were Appellants' assertions correct, that there is no common law, tort damage remedy for illegal strike activity, this Court's extensive discussion of preemption in *El Rancho* would have been pointless and superfluous. In the absence of a prior tort remedy, there would have been no jurisdiction in the first instance for the Legislature to preempt. In short, the award of tort damages for Appellants' illegal conduct is sanctioned by the common law in this State.[17]

The question thus becomes, as with the question of the legality of the strike in this case, whether this Court should change the common law allowance of damages for the illegal conduct in this case.[18] This Court has recognized:

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[17]Appellants argue that this Court's decision in *City and County of San Francisco v. Cooper,* 13 Cal. 3d 898, 120 Cal. Rptr. 707, 534 P. 2d 403 (1975), is inconsistent with a tort remedy for illegal strikes. In fact, *Cooper* held that the courts had no jurisdiction to decide whether the City and County of San Francisco were motivated by the illegal strike in that case, in their legislation concerning wages of striking public employees. Conversely, the courts below in this case clearly had jurisdiction to decide whether the District's damages were caused by Appellants' illegal strike.

[18]Appellants arguments in this regard are entirely inconsistent. Appellants concede that the remedy of injunction, at least in some instances, is appropriate, even though the Legislature has not expressly approved this remedy. Appellants suggest no basis, nor is there any, to distinguish among the various, common law remedies for illegal strike activity, none of which has received express, legislative approval in the Meyers-Milias-Brown Act.

Appellants also argue that the question of whether tort damages are available for otherwise illegal strike activity, citing this Court's decision in *City and County of San Francisco v. Cooper, supra,* should be resolved by the Legislature, while at the same time vigorously

> "The question as to what sanctions should appropriately be imposed on public employees who engage in illegal strike activity is a complex one which, in itself, raises significant issues of public policy."

City and County of San Francisco v. Cooper, supra, 13 Cal. 3d at 917. This Court should not, therefore, abandon the sanction of tort damages in the absence of direction from the Legislature on this complex question.[19]

Were this Court nevertheless to undertake determination of the appropriateness of the remedy in this case, and independently evaluate this complex policy question, it should find that the award of such damages for illegal strike activity under the Meyers-Milias-Brown Act should continue as a remedy. This Court has impliedly sanctioned both judicial and "self-help" remedies available to a public employer faced with illegal strike activity. In *IBEW, Local 1245 v. City of Gridley, supra,* in the course of holding that revocation of a labor organization's status

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asserting that the more fundamental and complex policy question of whether public sector employees should have a right to strike in the first instance, is appropriate for judicial solution. Contrary to Appellants' inconsistent assertions, changes in the common law rule prohibiting public sector strikes, and in the common law allowance of tort damages for such strikes, are both legislative questions.

[19]It should be noted that the Legislature has not responded to the Court of Appeal's holding in *Pasadena Unified School District v. Pasadena Federation of Teachers, supra.* Significantly, the Legislature has not hesitated to overturn Court of Appeal interpretations of the Meyers-Milias-Brown Act, with which it disagreed. *Compare, Rae v. Bay Area Rapid Transit Supervisory and Professional Ass'n,* 114 Cal. App. 3d 147, 170 Cal. Rptr. 448 (1980); *City of Hayward v. United Public Employees,* 54 Cal. App. 3d 761, 126 Cal. Rptr. 710 (1976) (construing the Meyers-Milias-Brown Act to prohibit requirement of "agency" fees as a condition of employment), *with Gov't Code* § 3502.5 (West Supp. 1983) (permitting negotiation of agency shop agreement).

as recognized, majority representative of certain public employees was unavailable as a self-help remedy under the Meyers-Milias-Brown Act, the Court stated:

> "Nor can the city contend that it is without other remedies in the strike context. In the past, numerous sanctions which do not interfere with workers' legitimate rights under the [Meyers-Milias-Brown Act] have been imposed in response to illegal strikes or strikes in violation of contract [including] . . . [injunctive relief]; . . . [and dismissal of striking employees]."

34 Cal. 3d at 204. The Court went on to hold that in dismissing striking employees, the public agency had to comply with constitutional, due process safeguards. *Cf. Arnett v. Kennedy,* 416 U.S. 134 (1974). Nevertheless, this Court clearly indicated that both the judicial remedy of injunction and the self-help remedy of dismissal of striking employees, were available to the public employer in response to an illegal strike, consistent with the policies of the Meyers-Milias-Brown Act, such as employee freedom of choice in selection of a collective-bargaining representative, and "full communication between public employers and their employees. . . ." *Gov't Code* § 3500 (West 1980). The remedy of tort damages is also consistent with these policies.

Another general purpose of the Meyers-Milias-Brown Act is the "improvement of personnel management and employer-employee relations." The court in *Lamphere Schools v. Lamphere Federation of Teachers, supra,* stated that recognition of a tort remedy "would encourage . . . inaction. Eventual settlements [of public labor disputes] could be prolonged pending the resolution of multiple tort claims and counterclaims. The inevitable result would be to create labor law log jams in our courts, and at the same

time, to exacerbate labor management disputes." 252 N.W. 2d at 830. The practical experience in the private sector is precisely the opposite of the *Lamphere* Court's conclusory statement.

This Court may take judicial notice that labor relations in the private sector tolerate substantial litigation, including tort actions for illegal strike activities before state and federal courts, and unfair labor practice proceedings before the National Labor Relations Board, very often continuing for years following the strike which engendered the litigation. Given this extensive judicial and administrative confrontation in the private sector, there is no basis for singling out a particular type of litigation in the public sector as inconsistent with harmonious labor relations. If Appellants truly desire to import strikes and other confrontation tactics prevalent in the private sector into public employee bargaining, they certainly cannot be heard to complain that court litigation inflames labor-management relations to a greater extent than their proposed economic warfare.

Moreover, the remedies which this Court has approved, and in which Appellants would acquiesce, the labor injunction and the dismissal of striking employees, are themselves arguably less conducive to labor relations harmony than is the tort remedy involved in this case. Discharge of striking employees not only exacerbates their relationship with the employer, it ends it. Indeed, this Court has impliedly termed "draconian" the remedy of mandatory dismissal of illegally striking public employees. *City and County of San Francisco v. Cooper, supra,* 13 Cal. 3d at 917. Similarly, it is hardly supportable that jail sentences for union officials, clearly a potential punishment for contempt, would render subsequent labor relations less turbulent than would tort litigation.

Appellants themselves argue that prohibition of strikes by public sector employees is a primary cause of discordant labor relations, which prohibition they concede to be permissible, through use of the labor injunction.

In short, the invocation of labor peace clearly does not justify dispensing with the heretofore recognized common law remedy of tort damages for Appellants' illegal conduct. There is no basis for declaring unavailable this traditional, common law remedy for Appellants' illegal strike. The Petition for Hearing should therefore be denied.

E. The Court Of Appeal's Findings Sustaining The Superior Court's Damage Award Were Correct.

Appellants renew in this Court their claims of error in the Superior Court's findings that the District's response to Appellants' illegal strike activity was reasonable and appropriate. Primarily, Appellants attack the level of staffing at the District's facilities during the strike. This assertion of error has no merit.

The basis for the District's damage claim is its right to recover the cost of reasonable actions taken to avoid the potentially harmful effects of Appellants' strike. *See* 23 *Cal. Jur.* 3d, Damages §§ 40-42 (1982); *see also, Barnes v. Berendes,* 139 Cal. 32, 72 Pac. 406 (1903), *modifying on other grounds,* 139 Cal. 39, 69 Pac. 491 (1902). It is axiomatic that the determination of whether the cost of mitigating damages was "reasonable" is a question of fact. *See Green v. Smith,* 261 Cal. App. 2d 392, 397, 67 Cal. Rptr. 796 (1968).

The handful of alleged occurrences at a few of the District's smaller, more isolated facilities, from which Appellants infer that management personnel were not always working during the strike, is hardly sufficient to

overcome the Superior Court's findings of fact. Moreover, the twenty-four hour staffing of District facilities was appropriate, in light of the strike-related vandalism and sabotage which occurred both during the 1974 and 1976 strikes. Payment of wages for all hours worked, including time which management employees spent sleeping, was entirely consistent with the District's Salary Resolution. (Ex. 130) *See Armour & Co. v. Wantock,* 323 U.S. 126 (1944); *Skidmore v. Swift,* 323 U.S. 134 (1944). Without belaboring the obvious, this finding of fact is supported by substantial evidence, and certainly does not constitute a significant question to which this Court should address itself. The requested Hearing on this issue should therefore be denied.

F. The Superior Court's Award of Prejudgment Interest Was Appropriate.

Appellants also claim error in the Superior Court's award of prejudgment interest. The Court of Appeal was correct in its holding that the damages in this case were liquidated, and therefore appropriately affirmed the award of prejudgment interest under Section 3287(a) of the Civil Code. The District's damages were proved by invoices for guard services, equipment, meals etc., and wages paid to management and supervisorial personnel, replacing striking employees. The fact that the damages initially claimed were greater than those ultimately awarded, and were reduced by several "offsets," is completely irrelevant to whether damages were liquidated under Section 3287(a). *See Lineman v. Schmid,* 32 Cal. 2d 204, 212, 195 P.2d 408 (1948) and cases cited there; *Leaf v. Phil Rauch, Inc.,* 47 Cal. App. 3d 371, 120 Cal. Rptr. 749 (1975); *Coleman Engineering Co. v. North American Aviation,* 65 Cal. 2d 396, 55 Cal. Rptr. 1, 420 P.2d 713 (1966).

Moreover, the Superior Court had discretion to award prejudgment interest even in the absence of calculable certainty in the damage award under Section 3288 of the Civil Code. *See Greater Westchester Home Owners' Ass'n v. City of Los Angeles,* 26 Cal. 3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979), *cert. denied,* 449 U.S. 820 (1980); *Bullis v. Security Pacific National Bank,* 21 Cal. 3d 801, 148 Cal. Rptr. 22, 582 P.2d 109 (1978); *Levy-Zentner Co. v. Southern Pacific Transportation Co.,* 74 Cal. App. 3d 762, 769 & n.28, 142 Cal. Rptr. 1 (1977). In the clear absence of any showing by Appellants that the Superior Court abused its discretion in awarding prejudgment interest, that award must be upheld, even were the damages not liquidated in this case.

CONCLUSION

Appellants' Petition for Hearing is essentially a request to this Court to overturn long-standing, common law rules prohibiting public sector strikes and allowing tort damages against unions and their agents who engage in such conduct. As these are both appropriately legislative issues, this Court need not review the Court of Appeal's decision, which is entirely consistent with these common law rules.

Even were there a right to strike under the Meyers-Milias-Brown Act, this case falls beyond the pale of any conceivably legitimate strike activity. The District's activities are absolutely essential to the health of over four million Los Angeles County residents. Further, even assuming the District's "bargaining" conduct were relevant to the legality of the strike, the evidence clearly demonstrates the District's good faith.

The Superior Court's other findings of fact are supported by substantial evidence, including findings that

the District's response to the illegal strike was reasonable. Lastly, the award of prejudgment interest was entirely appropriate, both as a matter of the Superior Court's sound discretion and as a matter of law.

For all the foregoing reasons, this Court should refuse to grant a hearing herein.

Dated: December 1, 1983

Respectfully submitted,

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2nd Civil No. 66088

(CERTIFICATE OF SERVICE BY MAIL —
Section 2015.5, C.C.P.)

JACQUELINE YUKAWA certifies that she is a citizen of the United States, over 18 years of age, a resident of the County of Los Angeles, and not a party to the within action; that her business address is Musick, Peeler & Garrett, One Wilshire Boulevard, Suite 2100, Los Angeles, California 90017; that on the 1st day of December, 1983, she served the within Answer to Petition for Hearing on the following named parties in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record as follows:

LEO GEFFNER AND JEFFREY PAULE
GEFFNER & SATZMAN
3055 Wilshire Boulevard
Suite 900
Los Angeles, CA 90010

JOHN J. CORCORAN, Clerk
Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012
(For: Hon. CHARLES H. OLDER)

CLAY ROBBINS, Clerk
Court of Appeal
Second Appellate District
Division Four
3580 Wilshire Boulevard
Los Angeles, CA 90010

STEVEN A. DIAZ, Esq.
Deputy City Attorney
City & County of San Francisco
Room 206 City Hall
San Francisco, CA 94102

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid in the United States mail at Los Angeles, California; that there is a delivery service by United States mail at the place so addressed, or there is a regular communication by United States mail between the place of mailing and the place so addressed.

I certify under penalty of perjury that the foregoing is true and correct.

Dated at Los Angeles, California
December 1, 1983

JACQUELINE YUKAWA

APPENDIX E

APPENDIX E

L.A. 31850

In the Supreme Court of the State of California

L.A. 31850
(Superior Ct. No. C-166-219)

COUNTY SANITATION DISTRICT NO. 2
OF LOS ANGELES COUNTY,
a public agency,
Plaintiff and Respondent,
VS.
LOS ANGELES COUNTY EMPLOYEES ASSOCIATION,
LOCAL 660, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO, *et al.,*
Defendants and Appellants.

ANSWER TO PETITION FOR REHEARING

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L.A. 31850

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

L.A. 31850
(Superior Ct. No. C-166-219)

COUNTY SANITATION DISTRICT NO. 2
OF LOS ANGELES COUNTY, a public agency,

Plaintiff and Respondent,

vs.

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION,
LOCAL 660, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO, et al.,

Defendants and Appellants.

ANSWER TO PETITION FOR REHEARING

To The Honorable Rose Elizabeth Bird, Chief Justice, And To The Honorable Associate Justices Of The Supreme Court Of The State Of California:

COMES NOW, Defendant and Appellant Los Angeles County Employees Association, Local 660 and herewith submits its Answer to the Petition for Rehearing on file herein.

PRELIMINARY STATEMENT

Plaintiff and Respondent County Sanitation District No. 2 of Los Angeles County ("Plaintiff" or "District") has filed a Petition for Rehearing on the grounds that: (1) the Court misapplied its new standard for determining the legality of public sector strikes to the facts in the instant case, (2) the Court's new standard for determining the legality of public sector strikes as applied to the

District's employees interferes with the District's obligations under federal law, and (3) the Court should remand the case to the Superior Court to take evidence under the new standard for determining the legality of public sector strikes. Plaintiff's arguments are without merit and, accordingly, the Court should summarily deny the Petition for Rehearing.

ARGUMENT

I

The Court Correctly Concluded That Under the New Standard for Determining the Legality of Public Sector Strikes, the Strike in the Instant Case Was Legal.

The Court announced the following standard to be used in determining the legality of a public sector strike:

> "Strikes by public employees are not unlawful at common law unless or until is is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public." (Slip Opn., p. 38.)

Contrary to Plaintiff's assertion, there was no substantial and imminent threat to the health or safety of the public with respect to the instant strike. The reason for this, as stated on several occasions by Plaintiff (see, e.g., Plaintiff's Brief to Court of Appeal, p. 5; RT: 1252:18 and 1258:5), is that the strike was not effective since management, supervisors, and other non-striking employees operated the District's facilities without any interruption. Thus, as this Court noted, "replacement personnel adequately maintained needed sanitation services without any significant threat of harm to the public." (Slip Opn., p. 40, n. 35.) Since the District was able to secure replacement personnel from the moment the strike

started, without any difficulty, there was no irreparable harm to public health or safety in the instant case.

Much of Plaintiff's argument regarding the legality of the instant strike under the Court's new standard is based on conjecture as to what might have happened had the District not been able to secure replacement personnel to operate the District's facilities. The fact is, the District's operation was never curtailed, and that is why the District was not able to show "that the health and safety of the public was at any time imminently threatened." (Slip Opn., pp. 39-40.) Accordingly, the Court correctly concluded that "the legality of the strike would have been upheld under [the Court's] newly adopted standard." (Slip Opn., p. 40.)

II

Plaintiff Improperly Argues That the Court's New Standard for Determining the Legality of Public Sector Strikes Interferes with Plaintiff's Obligations Under Federal Law, in That the Federal Laws Asserted Were Not Presented By Plaintiff When the Case Was Originally Submitted.

Plaintiff argues, for the first time, that the Court's determination that the instant strike was legal impermissibly interferes with the Federal Water Pollution Control Act (33 U.S.C. Sections 1251, et seq.) and the Federal Resource Conservation and Recovery Act of 1976 (42 U.S.C. Sections 6901, et seq.). Nowhere in Plaintiff's Answer to the Petition for Hearing in this case did

Plaintiff raise any federal environmental or pollution control statute in support of its position.[1]

On numerous occasions, this Court has declared that it will not grant a rehearing on points newly urged in a petition for rehearing. It is the duty of counsel to see that all points are properly presented in the original briefs or argument, before submission. As early as 1857, this Court, in *Andrews vs. Mokelumne Hill Company,* 7 Cal. 330, 333, characterized the practice of attorneys of raising new points in a petition for rehearing as a "most pernicious practice". Since *Andrews*, this Court and the Courts of Appeal have refused to grant rehearings on points newly urged in a petition for rehearing. See *Estabrook Co. vs. Ind. Acc. Com.* (1918), 177 Cal. 767, 771; *Prince vs. Hill* (1915), 170 Cal. 193, 195; *Smith vs. Crocker First National Bank* (1957), 152 Cal.App.2d 832, 836; *Epperson vs. Rosemond* (1950), 100 Cal.App.2d 344, 347; *Pacific Finance Corp. vs. Lynwood* (1931), 114 Cal.App. 509, 516.

Additionally, the federal statutes raised for the first time by Plaintiffs are environmental and pollution control statutes. These laws have nothing whatsoever to do with labor-management relations. There are a multitude of federal laws touching upon all aspects of our daily lives. This does not mean that local public employee labor-management relations are subject to these various federal laws.

It is clear that Plaintiff has raised the Federal Water Pollution Control Act and the Federal Resource Conservation and Recovery Act of 1976 as a veiled attempt to inject a "federal issue" into the instant case so that an

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[1]Plaintiff did refer to the Clayton Antitrust Act (15 U.S.C. Sections 15, 17 and 26) and various sections of the National Labor Relations Act (29 U.S.C. Sections 150, et seq.).

appeal to the U.S. Supreme Court will be possible. This conduct also constitutes a "pernicious practice." The Petition for Rehearing should therefore be denied.

III

A Remand to the Superior Court Is Not Necessary.

As aforementioned, the Court concluded that in the instant case, "there was no showing by the District that the health and safety of the public was at any time imminently threatened." (Slip Opn., pp. 39-40.) The Court was able to reach this conclusion because the transcripts and exhibits in the instant case presented a full and complete record of the events preceding, during, and after the strike. The trial was a lengthy one, with hundreds of exhibits and over 1,000 pages of testimony. Furthermore, the trial court made detailed findings. A remand in the instant case is simply not necessary, and therefore a rehearing should not be granted.

CONCLUSION

For all the foregoing reasons, Plaintiff's Petition for Rehearing should be denied.

Respectfully submitted,

GEFFNER & SATZMAN
A Professional Corporation

By_____
JEFFREY PAULE
Attorneys for Defendant
Los Angeles County Employees
Association, Local 660

DATED: June 3, 1985

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing_____
_____and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner_____ ☐ a_____ of_____
a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for_____,
a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on_____, 19___,
at_____California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Type or Print Name _____ Signature _____

ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT
(other than summons and complaint)

Received copy of document described as_____ on_____19___.

Type or Print Name _____ Signature _____

PROOF OF SERVICE
STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 3055 Wilshire Blvd., Suite 900, Los Angeles, CA 90010.

On June 4, 1985, I served the foregoing document described as Answer To Petition For Rehearing on the parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

See Attached

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on_____, 19___, at_____, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on_____, 19___, at_____, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

ALICE BROGLIA	/s/ Alice Broglia
Type or Print Name	Signature

PROOF OF SERVICE LIST

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